110-701

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 18

SARAH A. CLAYTON AND RICHARD MACKEY, PLAINTIFFS IN ERROR,

vs.

SARAH A. CLAYTON, WIDOW AND HEIR AT LAW OF JAMES W. CLAYTON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 16, 1879.

1 Pleas in the circuit court of the United States for the district of Colorado, before the honorable the judges thereof.

SARAH A. CLAYTON, WIDOW AND HEIR AT LAW of James W. Clayton, plaintiff, *vs.* SARAH A. CLAYTON AND RICHARD MACKEY, defendants.	For possession of specific real property, &c.

Be it remembered that heretofore and on, to wit, the 20th day of June, A. D. 1878, came L. C. Rockwell, esq., an attorney of record in said court, and filed in said court a complaint, and sued out of said court a writ of summons in a certain cause in said court then pending, wherein Sarah A. Clayton, was plaintiff, and Sarah A. Clayton and Richard Mackey were defendants, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA,
State of Colorado:

In the United States circuit court for the eighth judicial district, in and for the district of Colorado, July term thereof, A. D. 1878.

2 SARAH A. CLAYTON, WIDOW AND HEIR at law of James W. Clayton, late of Gilpin County, deceased,
against
SARAH A. CLAYTON AND RICHARD MACKEY.

Plaintiff complains and alleges:

1. That for the past five years she has been and still is a citizen of the State of Illinois, and a resident thereof. That she is the widow and heir at law of James W. Clayton, deceased. That on or about the 10th day of October, A. D. 1874, her husband died intestate, leaving surviving him the plaintiff and their two daughters, named, respectively, Lillie U. & Jessie L. Clayton, as his sole heirs at law.

2d. That at and before the time of his death said James W. Clayton was seized in fee of the following-described property, to wit:

The southeast one-quarter (¼) of the southeast one-quarter (¼) of section eleven (11), township three (3) south, of range seventy (70) west; also the north one-half (½) of the northwest one-quarter (¼) of section thirteen (13), township three (3) south, of range seventy (70) west; the east one-half (½) of the northeast one-quarter (¼) and east one-half (½) of the southeast one-quarter (¼) section fourteen (14), township three (3) south, of range seventy (70) west; the south one-half (½) of the northwest one-quarter (¼) and west one-half (½) of southwest
3 one-quarter (¼) of section thirteen, township three (3) south, of range seventy (70) west.

And was at the time of his death in possession of the same. All of said property is situate in the county of Jefferson, State of Colorado.

And at the time of his death he was also the owner and in possession of the following described real estate, mining claims, and premises, situate in Gilpin County, Colorado; The American Flag lode, being three

hundred (300) consecutive feet along the vein thereof, being claims numbers two, three, & four, east from the Discovery claim on said lode, by fifty feet in width, which said claims commence at the east end of the American Flag Gold Mining Company's property, and extends easterly therefrom a distance of three hundred (300) feet.

Also a mill site, situate in said Nevada mining district and between and bounded by the mill site formerly owned and known as the Symonds and Mallory mill site on the east, and by the Douglas and Bucker mill site on the west, and in width extending from gulch to gulch; on which site there are two quartz mills, both operated and run by one steam-engine; also the stable, houses, & office; which mill site extends up and down the gulch for the space of two hundred and fifty feet, and from bank to bank across the gulch, and known as the Clayton mill site.

4 3d. The plaintiff, as the widow and heir at law of said James W. Clayton, is the owner in fee of the equal and undivided half of the following described premises and lands, to wit:

The southeast one-quarter (¼) of the southeast one-quarter (¼) of section eleven (11) township three, (3) south, of range seventy, (70) west; also the north one-half (½) of the northwest one-quarter (¼) of section thirteen (13), township three (3) south, of range seventy (70), west; the east one-half (½) of the northeast one-quarter (¼) and east one-half (½) of the southeast one-quarter (¼) section fourteen (14), township three (3) south, of range seventy (70) west; the south one-half (½) of the southwest one-quarter (¼) and west one-half (½) of southwest one-quarter (¼) of section thirteen, township three (3) south, of range seventy, (70) west. All of said property situate in Jefferson County, Colorado.

And plaintiff in the same capacity is the owner of and entitled to the possession of the equal and undivided one-half of the following described real estate, mining claims, mill site, and premises situate in Gilpin County, Colorado, to wit:

The American Flag lode, being three hundred (300) consecutive feet along the vein thereof, and being claims numbers two, three, and four, east from the Discovery claim on said lode, by fifty feet in width, which said claims commence at the east end of the American Flag Gold Mining Company's property and extends easterly therefrom a dis-

5 tance of three hundred (300) feet. Also a mill site situate in said Nevada mining district and between and bounded by the mill site formerly owned and known as the Symonds and Mallory mill site on the east, and by the Douglas and Becker mill site on the west, and in width extending from gulch to gulch; on which site there are two quartz mills, both operated and run by one steam-engine; also the stable, houses, & office; which mill site extends up and down the gulch for the distance of two hundred and fifty (250) feet and from bank to bank across the gulch, and known as the Clayton mill site.

4. The plaintiff avers she claims the legal right to occupy and possess the mining claims and mill-site property and premises described as being in Gilpin County, under the local laws, rules, and customs of miners of Nevada mining district and the laws of the United States and those of Colorado relating to the occupation and possession *and possession* of such character of claims, property, and premises; and also by virtue of the purchase of said premises by said James W. Clayton in his life and his occupying the same and by inheritance from the estate of said James W. Clayton as his widow and heir at law.

5. The plaintiff further alleges that Richard Mackey is a citizen of

the State of Colorado and a resident thereof, and is now in pos-
6 session of the mill site and quartz mills as a tenant of his co-defendant, Sarah A. Clayton. That the balance of the above-described premises are not actually occupied by any person.

6. That the plaintiff is entitled to the possession of the premises and property above described and every part and portion thereof. That the defendant Sarah A. Clayton is now a citizen of the State of Colorado and a resident thereof, and that on the first day of April, A. D. 1877, she wrongfully ousted the plaintiff therefrom and wrongfully withheld the same from plaintiff. That as to said mill site and the quartz mills thereon the said defendants Sarah A. Clayton and Richard Mackey, on the said first day of April, A. D. 1877, wrongfully ousted the plaintiff therefrom, and now wrongfully withholds the said mill site and quartz mills from the said plaintiff.

7. That the matter in dispute in this case exceeds the sum of five thousand dollars exclusive of costs.

8. That the value of the rents, issues, and profits of said mill site and quartz mills from the said first day of April, A. D. 1877, until this time is one hundred and fifty dollars for each and every month for the undivided half thereof; wherefore the plaintiff demands judgment against said defendants.

7 1st. For the restitution of said land and premises held by them jointly and separately.

2d. For the sum of one dollar damages for the withholding of said mill site and quartz mills and premises.

3d. For twenty-two hundred and fifty dollars, the value of the rents and profits from said mill site and quartz mill, with costs of suit.

(Signed) SARAH A. CLAYTON,
By L. C. ROCKWELL.

L. C. ROCKWELL,
Att'y for Pl'ff.

STATE OF COLORADO, *ss:*

Lewis C. Rockwell, of lawful age, being first duly sworn, on oath states that he is the agent of the plaintiff in the foregoing complaint; that he has read the same and knows the contents thereof; that the matters and things therein alleged are true to the best of his knowledge and belief; that the reason why this verification is made by him as agent in place of plaintiff in person is that plaintiff is absent from the State of Colorado, and is a resident of the State of Illinois, and cannot make the same.

(Signed) LEWIS C. ROCKWELL.

Subscribed and sworn to before me this 20th day of June, A. D. 1878.

SEAL CIR'T C'T U. S., COLO. (S'd) EDWARD F. BISHOP,
Clerk C't C't U. S.,
By HENRY SPARNICK,
Deputy.

8 (Indorsed:) No. 172. In U. S. court, 8th judicial dist., Colorado. Sarah A. Clayton, widow and heir at law of James W. Clayton, deceased, against Sarah A. Clayton & Richard Mackey. Complaint. Filed June 20th, A. D. 1878. (S'd) Edward F. Bishop, clerk, by Henry Sparnick, deputy. L. C. Rockwell, att'y pl'ff.

And the said summons is in words and figures as follows, to wit:

9 *Summons.*

In the circuit court of the United States for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

SARAH A. CLAYTON, PLAINTIFF,
versus
SARAH A. CLAYTON AND RICHARD MACKEY, defendant'.

Complaint filed in the clerk's office this 20th day of June, A. D. 1878.

The President of the United States of America to Sarah A. Clayton and Richard Mackey, greeting:

You and each of you are hereby notified that an action has been brought in said court by Sarah A. Clayton, plaintiff, against you, as defendants, to recover the possession of certain land and premises described in the complaint filed herein, to which reference is hereby made, for one dollar damages for the detention thereof, for the sum of twenty-two hundred and fifty dollars, the value of the rents and profits from said premises, and for costs of suit.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and, if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complainant, for the recovery of the aforesaid land and premises, for damages as aforesaid, for the said sum of twenty-two hundred and fifty dollars, and for costs of this suit.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Denver, in said district, this 20th day of June, A. D. 1878, and of the Independence of the United States the 102d year.

SEAL CIRC'T C'T U. S., DIST. OF COLO.

(Signed) EDWARD F. BISHOP, *Clerk*,
By
Deputy Clerk.

10 UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, *July 29th*, 1878.

I hereby certify that I received the attached writ on the 20th day of June, 1878, and that I have served the same upon Richard Mackey, of said defendants, by delivering to Mrs. Mackey, wife of the said Richard Mackey, a person over the age of 15 years, a true copy of the attached writ, at his residence, at Nevady, in Gilpin County, in said district, on the 27th day of July, A. D. 1878. This writ therefore returned, as the law directs, this 29th day of July, A. D. 1878.

(Signed) P. P. WILCOX,
U. S. Marshal.

Proof of service.

UNITED STATES OF AMERICA,
District of Colorado, ss:

JULY 9TH, A. D. 1878.

nereby certify that I received the within writ on the 20 day of

June, A. D. 1878, and that I have personally served the same upon Sarah A. Clayton, of the said defendants, by delivering to her personally a true copy of the within writ, at the day and time as follows: As to Sarah A. Clayton at , county of Weld, on the ninth day of July, A. D. 1878.

Richard Mackey not found by me up to this date.

This writ therefore returned, as the law directs, this 29th day of July, A. D. 18 8.

Marshal's fees: Service, 1 def't, @ $2 ea., $2.00; livery, $2.00; , $; , $; , $ —total, $18.25; paid by L. C. Rockwell.

(Signed) P. P. WILCOX, *Marshal*,
By JAMES STANTON,
Deputy Marshal.

(Indorsed:) Gen. No. 172. Circuit court of the United States, district of Colorado. Sarah A. Clayton, plaintiff, versus Sarah A. Clayton and Richard Mackey, defendants. Summons. Filed this 29th day of July, A. D. 1878. (S'd) Edward F. Bishop, clerk, by , deputy clerk. L. C. Rockwell, attorney for plaintiff.

11 And afterwards, and on, to wit, the 6th day of August, A. D. 1878, came the said defendant, Sarah A. Clayton by H. M. and Willard Teller, her attorneys, and filed in said court and in said cause her separate answer to the said complaint.

And the said separate answer is in words and figures as follows, to wit:

Separate answer of Clayton.

In the circuit court of the United States, State and district of Colorado.

SARAH A. CLAYTON, HEIR AT LAW, AND WIDOW of James W. Clayton, late of Gilpin Co., deceased, *vs.* SARAH A. CLAYTON, RICHARD MACKEY.	Sep. ans. S. A. Clayton.

The defendant, Sarah A. Clayton, answering the complaint herein, says that the said Sarah A. Clayton, the plaintiff, is not the heir at law, and is not the widow of the said James W. Clayton, deceased. That she admits that James W. Clayton refer'ed to by said plaintiff in her said complaint, died intestate about the 10th day of October, A. D. 1874, leaving as his survivors and heirs, the two daughters in said complaint named; but she denies that said plaintiff was left an heir
12 of the said James W. Clayton, or is now an heir of said James W. Clayton, deceased.

2d. The defendant admits that at the time of the death of the said Clayton he was seized in fee of the real estate situate in Jefferson County, Colorado, in said plaintiff' declaration described, and that the said Clayton was also, at the time of his death, the owner of and in possession of the real estate, mining claims, and premises in Gilpin County in said plaintiff's complaint mentioned and described.

3d. This defendant further says that the said plaintiff is not the widow or heir at law of the said plaintiff, is not the owner in fee of the undivided half of the premises and lands in said plaintiff's complaint mentioned and described, nor of any part or portion thereof, nor of any

part or portion of the mining claims or mill property in said complaint described.

4th. The defendant, further answering, says that said plaintiff has no legal right to occupy or possess the mining claims or mill property in said complaint described, in accordance with any law or rules or customs of mines of Nevado mining district, or of any other district or of the United States, or of Colorado, nor by virtue of any purchase of said premises by said Clayton, deceased, or by inheritance from the estate of the said Clayton, deceased, as his widow or heir at law.

5th. The defendant further says, she admits that said defendant Mackey, is a citizen of the State of Colorado, and is now in the possession of the mill-site and quartz mill, but she avers the fact to be
13 that the said Mackey is occupying the same as the tenant of this defendant, and the said Lillie V. and Jessie L. Clayton, heirs at law of the said James W. Clayton, *heirs at law of the said James W. Clayton*, deceased.

6th. Said defendant denies that said plaintiff is entitled to the possession of any part or portion of the premises in said complaint mentioned and described; denies that she has ever at any time ousted the said plaintiff from any of the said premises. She admits that she is now holding the premises from the said plaintiff, but avers that she rightfully holds the same as against the said plaintiff, and does not wrongfully withhold the same. Said defendant admits the property mentioned as the matter in dispute is worth more than five thousand dollars.

7th. This defendant denies that the rents and profits of an undivided one-half of said mill since the first day of April, 1877, is worth one hundred and fifty dollars per month.

(Signed) H. M. & WILLARD TELLER,
Att'ys for Def't.

STATE OF COLORADO,
County of Arapahoe, ss:

Willard Teller, being first duly sworn, says he is one of the att'ys of the above-named defendant, Sarah A. Clayton, and has read the foregoing answer of said defendant, and that the same is true the
14 best knowledge, information, and belief of this affiant; that the said defendant Sarah A. Clayton is absent from the county of Arapahoe, where this affiant resides, which is the reason why this affidavit is made by affiant.

(Signed) WILLARD TELLER.

Subscribed and sworn to before me this 5th August, A. D. 1878.
[NOTARIAL SEAL.] (S'd) JAMES M. LOMERY,
Notary Public.

(Endorsed:) 172. In circuit court. Sarah A. Clayton vs. Sarah A. Clayton, Richard Mackey. Answer of S. A. Clayton. Filed Aug't 6th, A. D. 1878. (S'd) Edward F. Bishop, clerk. H. M. & Willard Teller, att'ys for def't.

And afterwards, and on, to wit, the 2d day of September, A. D. 1878, came the said defendant, Richard Mackey, by H. M. & Willard Teller, esqs., his attorneys, and filed in said court, and in said cause, his separate answer to the said complaint. And the said answer is in words and figures as follows, to wit:

15 *Separate answer of Mackey.*

UNITED STATES OF AMERICA,
State of Colorado:

In the United States circuit court, eighth judicial district, in and for the district of Colorado. July term, 1878.

SARAH A. CLAYTON, PLAINTIFF,
vs.
SARAH A. CLAYTON AND RICHARD MACKEY, defendants.
} Separate answer of Richard Mackey.

This defendant, Richard Mackey, for his separate answer to plaintiff's complaint in the above-entitled action, says:

That he has no personal knowledge as to whether or not plaintiff is the widow of James W. Clayton. That he is informed and believes that she is not such widow. This defendant is informed and believes that Lillie U. and Jessie L. Clayton are heirs at law of said James W. Clayton. This defendant is informed and believes that James W. Clayton died seized in fee of the property mentioned in said complaint situate in Gilpin County. As to the other property he has no information or belief.

Denies, on his information and belief, that plaintiff is the owner in fee of the property in the complaint described, or any part or parcel of the same or interest therein.

Denies, on his information and belief, that plaintiff has any
16 right to occupy or possess the property in Gilpin County, described under the local laws or rules or customs of mines of Nevada or any other mining district, or the laws of Colorado or the United States, or by purchase or otherwise.

Admits that he is in possession of said mills and mill site in Gilpin County, one-half undivided by leave from said Lillie U. and Jessie L. Clayton, and one-half undivided by leave from his codefendant, as widow of said James W. Clayton, deceased, and as administratrix of the estate of said James W. Clayton, deceased.

Denies that plaintiff is entitled to the possession of the premises or property in said complaint described in Gilpin County, or any part or portion thereof or interest therein.

Denies that he, or he and his codefendant, or either of them, on the 1st day of April, 1877, or at any other time wrongfully or otherwise ousted plaintiff therefrom, or now withholds or withheld said property or any part or portion thereof, or any right, title, or interest therein from plaintiff.

Denies that the rents, issues, or profits of said property are one hundred and fifty dollars, or any other sum for each and every month, or any other time.

This defendant, further answering, says that he occupies and possesses the undivided one-half of said mills and mill site and property in said complaint described, as the tenant and lessee of said
17 Lillie U. Clayton and Jessie L. Clayton, daughters and heirs at law of said James W. Clayton, deceased, and the other undivided one-half thereof as the tenant and lessee of his codefendant, Sarah A. Clayton, widow of said James W. Clayton, deceased, and administratrix of the estate of said James W. Clayton, deceased.

(Signed.) RICHARD MACKEY.
H. M. & WILLARD TELLER.
Atty's for Def't.

STATE OF COLORADO,
Gilpin County, ss:

Richard Mackey, being duly sworn on his oath, says that he is one of the defendants in the above-entitled action, that has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except the matters and things therein stated on his information and belief, and as to those matters he believes it to be true.

(Signed) RICHARD MACKEY.

Subscribed and sworn to before me this 31st day of August, A. D. 1878.

[NOTARIAL SEAL.] (S'd) HARTER M. ORAHOOD.
Notary Public.

(Endorsed:) 172. In circuit court. Sarah A. Clayton vs. Sarah A. Clayton & Richard Mackey. Answer of Richard Mackey. Filed Sept. 2d, A. D. 1878. (S'd) Edward F. Bishop, clerk. H. M. & Willard Teller, atty's for def't, Denver, Colo.

18 And afterwards, and on, to wit, the third day of January, A. D. 1879, the same being one of the regular judicial days of the December term, A. D. 1878, of said court, present, the honorable Moses Hallett, district judge, the following proceedings were had and entered of record in said court and in said cause, to wit:

Order: Hearing by court.

SARAH A. CLAYTON, WIDOW, &C., *vs.* SARAH A. CLAYTON ET AL. } For possession of real property, &c.

At this day comes the said plaintiff by L. C. Rockwell, esq., her attorney, and the said defendants by Willard Teller, esq., their attorney, also come.

And this cause now coming on to be tried by the court without a jury, in pursuance of the stipulation thereto heretofore filed herein, and the court having heard the evidence produced herein on behalf of the said plaintiff, the said defendant, Sarah A. Clayton, moves the court for judgment as in case of non-suit as to her, the said Sarah A. Clayton, which is argued by counsel, and the court being now sufficiently advised in the premises—

It seemeth to the court here that the evidence heard is sufficient to warrant a finding by the court herein, and the said motion is denied. And the court having heard the evidence produced herein
19 as well by the plaintiff as by the said defendants doth take the same under advisement.

And afterwards, and on, to wit, the 3d day of March, A. D. 1879, the same being one of the regular judicial days of the December term, A. D. 1878, of said court, present, the honorable Moses Hallett, district judge, the following proceedings were had and entered of record in said court and in said cause, to wit:

Order, finding & judgment.

SARAH A. CLAYTON, WIDOW AND HEIR AT LAW of James W. Clayton, deceased,
vs.
SARAH A. CLAYTON AND RICHARD MACKEY.

Finding and judgment for possession of real property and for damages.

The court finds from the evidence—

1st. That plaintiff and James W. Clayton intermarried at Wheeling, in the State of Virginia, on the 3d day of May, A. D. 1855.

2d. That on the first day of March, A. D. 1867, the said James W. Clayton filed his bill for divorce against the said plaintiff in the district court of Gilpin County, Colorado Territory, which was a court of competent jurisdiction in that behalf; that the cause alleged in said bill as ground for divorce was that the said James W. Clayton had in
20 1863 taken the defendant therein, the plaintiff in this suit, to the State of Illinois, and that she, the defendant therein, had refused to return to Colorado, and had refused to live with said James W. Clayton, although he, the said James, had often requested her to do so, and that he, the said James, had offered to furnish to her, the defendant therein, a home and sufficient maintenance in Colorado.

3d. That the plaintiff in this suit was on the said first day of March, A. D. 1867, and thereafter until the present time, a citizen and resident of the State of Illinois.

4th. That at the time of filing said bill in the district court of Gilpin County, a summons was issued out of said court, directed to the sheriff of said Gilpin County to execute, commanding him, the said sheriff, to summon the said plaintiff to answer the said bill, which summons was in all respects as required by the law of the Territory then in force regulating such matters.

5th. That the said sheriff of Gilpin County, on the same first day of March, A. D. 1867, returned the said summons into the said district court of Gilpin County with his endorsement thereon that the defendant therein, the plaintiff in this suit, was not found in his county.

6th. That a notice of the pendancy of said suit in the said district court of Gilpin County was published in a weekly newspaper
21 printed and published in *a weekly newspaper printed and published in* the said Gilpin County, for four weeks, beginning with and next after the first day of March, A. D. 1867; and the first publication of said notice was more than thirty days before the return-day of said summons; that the certificate showing such publication was to the effect that the first publication of such notice was on the 1st day of March, 1867, and the last publication was on the 26 day of March, 1867; that said certificate was filed in said cause on the 22 day of March, 1867.

7th. That the defendant in the said divorce suit (the plaintiff in this suit) was not notified of the pendency thereof, except as aforesaid.

8th. That a decree was entered in the said suit, brought in the said district court of Gilpin County, on the 26th day of June, A. D. 1868, divourcing the said James W. Clayton from the defendant therein (the plaintiff in this suit). Which said decree recites at the commencement thereof that it appearing to the court that due service had been had upon said defendant before the fourth day of April, 1867, and that such service had been made, according to the laws of the Territory of Colo-

rado and the rules and practice of that court, more than ten (10) days previous to the first day of the April term of said court, and that the defendant was called and defaulted.

9th. That the said James W. Clayton and the defendant in
22 this suit, Sarah A. Clayton, intermarried in the year 1870, at and within the State of Colorado.

10th. That the said James W. Clayton departed this life about the 10th day of October, A. D. 1874, leaving the said plaintiff and two children, issue of his marriage with the said plaintiff, him surviving.

11th. That at and before the time of his death the said James W. Clayton was seized in fee of the premises described in the complaint as situated in Jefferson County.

12th. That at and before the time of his death the said James W. Clayton was the owner of the premises described in the complaint as situated in the county of Gilpin, and the said James W., in virtue of such ownership, was entitled to hold, occupy, and possess the same.

13th. That the value of the use and occupation of the said premises since the third day of April, A. D. 1877, and the rents, issues, and profits thereof, as to the undivided one-half part thereof is seventeen hundred and twenty-five dollars.

Wherefore the court finds as a matter of law:

First. That because the said defendant therein (the plaintiff in this suit) was not properly notified of the pendency of said suit in the district court of Gilpin County, the decree of divorce entered therein, was, and is void and of no effect.

Second. That the said plaintiff in this suit, in virtue of her marr'age with the said James W. Clayton, was, and is, with the surviving
23 children before mentioned, his heir at law, and as such is entitled to one-half part of his estate.

Third. That the said plaintiff is the owner in fee of the undivided one-half part of the estate described in the complaint as situated in Jefferson County.

Fourth. That the said plaintiff is the owner and under the laws of the State is entitled to hold, occupy, and possess the undivided one-half part of the estate described in the complaint as situated in Gilpin County.

Fifth. That the said plaintiff is entitled to recover of the said defendants as and for the rents, issues, and profits of said premises and damages for the detention thereof, the said sum of seventeen hundred and twenty-five dollars.

Wherefore let judgment be entered accordingly against the said defendants, and in favor of the said plaintiff.

And afterwards, and on, to wit, the same day, to wit, the 3d day of March, A. D. 1879, judgment was duly entered against the said de-. fendants on the "judgment book" of said court, and in said cause in pursuance of the statute and rules of court. And the said judgment order is in words and figures as follows, to wit:

24 *Judgment.*

SARAH A. CLAYTON, WIDOW AND HEIR AT LAW of James W. Clayton, deceased, *vs.* SARAH A. CLAYTON AND RICHARD MACKEY.	Judgment for possession of real property and for damages.

On this third day of March, A. D. 1879, the same being one of the regular judicial days of the December term, A. D. 1878, of said court,

there being present the honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendants possession of the undivided half of the premises in the complaint mentioned, to wit:

The southeast one-quarter (¼) of the southeast one-quarter (¼) of section eleven (11), township three (3) south, of range seventy (70) west; also the north one-half (½) of the northwest one-quarter of section thirteen (13), township three (3) south, of range seventy (70) west; the east one-half (½) of the northeast one-quarter (¼) and east one-half (½) of the southeast one-quarter (¼) section fourteen (14), township three (3) south, of range seventy west; the south one-half (½) of the northwest one-quarter (¼) and west one-half (½) of southwest one-quarter (¼) of section thirteen, township three (3) south, of range seventy (70) west; all of said property situate in Jefferson County, Colorado. Also the American Flag lode, being three hundred (300) consecutive feet along the vein thereof, and being claims numbers two, three, and four east from the Discovery claim on said lode
25 by fifty feet in width, which said claims commence at the east end of the American Flag Gold Mining Company's property, and extends easterly therefrom a distance of three hundred (300) feet. Also a mill-site, situate in said Nevada mining district, and between and bounded by the mill-site formerly owned and known as the Symonds and Mallory mill-site on the east and by the Douglas and Becker mill-site on the west, and in width extending from gulch to gulch; on which site there are two quartz mills, both operated and run by one steam-engine; also the stables, houses, and office; which mill-site extends up and down the gulch for the space of two hundred and fifty (250) feet and from bank to bank across the gulch, and known as the Clayton mill-site, situate in the county of Gilpin and State of Colorado, and that she have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendants one thousand seven hundred and twenty-five dollars ($1,725.00), her rents, issues, profits, and damages for the wrongful withholding thereof in form heretofore assessed, and her costs by her in this behalf laid out and expended, or to be laid out and expended, to be taxed and have execution therefor.

And afterwards, and on, to wit, the 10th day of March, A. D. 1879,
26 came again the said defendants by H. M. & Willard Teller, esqs., their attorneys, and filed in said court and in said cause their bill of exceptions to the finding of the court herein, and the said bill of exceptions is in words and figures as follows, to wit:

Bill of exceptions.

In circuit court of the United States, district of Colorado.

SARAH A. CLAYTON
vs.
SARAH A. CLAYTON, RICHARD MACKEY. } Bill of exceptions.

Be it remembered that at the December term, A. D. 1878, of the said circuit court of the United States for the district of Colorado, this cause coming on for trial before one of the judges of said court, a jury having been waived, the said court having heard the evidence makes a special finding of the facts and law, and finds the issues for the plaint-

iff, which said finding is entered of record herein; to which finding on questions of law and to the finding for plaintiffs therein the said defendants, by their counsel, then and there excepts; and because said exception so taken does not appear of record, the counsel for defendants presents this bill of exceptions, and prays that it may be signed and sealed by the court and made part of the record in said cause, and it is done accordingly.

(Signed) MOSES HALLETT, [SEAL.]
District Judge.

27 (Endorsed:) 172. In circuit court. Sarah A. Clayton vs. Sarah A. Clayton, Richard Mackey. Bill of exceptions. Filed Mar. 10, 1879. (S'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 13th day of May, A. D. 1879, the same being one of the regular judicial days of the May term, A. D. 1879, of said court, present, the honorable Moses Hallett, district judge, the following proceedings were had and entered of record in said court and in said cause, to wit:

Order: Second trial awarded.

SARAH A. CLAYTON *vs.* SARAH A. CLAYTON ET AL. } Order: Second trial awarded. Ejectment.

At this day come the said defendants by Willard Teller, esq., their attorney, and move the court to vacate the judgment lately had herein and for a new trial of the issues herein joined.

And it appearing to the court that the said defendants have fully paid and discharged the taxed costs herein, therefore it is ordered that the judgment lately and on the 3d day of March, A. D. 1879, had
28 herein be vacated and for naught held, and that a new trial of the said issues be had in pursuance of the statute in such case made and provided.

And afterwards, and on, to wit, the 22d day of July, A. D. 1879, the same being one of the regular judicial days of the May term, A. D. 1879, of said court, present, the honorable Moses Hallett, district judge, the following proceedings were had and entered of record in said court and in said cause, to wit:

Order: Vacating order granting 2d trial.

SARAH A. CLAYTON *vs.* SARAH A. CLAYTON ET AL. } For possession of specific real property.

At this day comes the said plaintiff, by L. C. Rockwell, esq., her attorney, and the said defendants by Willard , esq., their attorney, also come.

And the motion and affidavit on behalf of the said plaintiff to vacate the order lately setting aside the judgment of the court, and granting a new trial of the said issues having heretofore come on to be heard, and having been submitted to the court, and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be granted.

29 Therefore it is ordered by the court that the order of the court lately, and on the 13th day of May, A. D. 1879, had herein vacating the judgement and granting a new trial be vacated, and for naught held, and that the judgment of the court had herein at the December term, A. D. 1878, to wit, on the third day of March, A. D. 1879, stand with full force and effect.

And afterwards, and on, to wit, the 10th day of September, A. D. 1879, came again the said defendants, by Willard Teller, esq., their attorney, and filed in said court and in said cause their bond for a writ of error, and sued out of said court a writ of error.

And the said bond is in words and figures as follows, to wit:

30 *Writ of error bond, U. S. circuit court, Colorado.*

THE UNITED STATES OF AMERICA,
District of Colorado:

Know all men by these presents, that we, Henry M. Teller, as principal, and Willard Teller as surety, are held and firmly bound unto Sarah A. Clayton in the full and just sum of five hundred dollars, to be paid to the said Sarah A. Clayton; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 9th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately, at the December term, A. D. 1878, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between Sarah A. Clayton, plaintiff, and Sarah A. Clayton and Richard Mackey, defendants, judgment was rendered against the said defendants for the recovery of certain property, and for the sum of fifteen hundred and twenty-five dollars and costs, and the said Sarah A. Clayton and Richard Mackey having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sarah A. Clayton citing and admonishing her to be and appear at a Supreme Court of the United States to be held at Washington on the 2d Monday of October next:

Now, the condition of the above obligation is such, that if the said Sarah A. Clayton and Richard Mackey shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY M. TELLER. [SEAL.]
" WILLARD TELLER. [SEAL.]

Approved:
(Signed) MOSES HALLETT, *Judge.*

31 (Indorsed:) Gen. No. 172. Circuit court of the United States, district of Colorado. Sarah A. Clayton and Richard Mackey, plaintiffs in error, vs. Sarah A. Clayton, widow, & heir, &c. Appeal bond, $500.00. Filed in the circuit court U. S. this 10th day of September, A. D. 1879. (S'd) Edward F. Bishop, clerk, by , deputy clerk.

31½ And the said writ of error is hereto attached and follows, to wit:

32 *Writ of error to circuit court U. S., district of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between Sarah A. Clayton, widow and heir at law of James W. Clayton, deceased, and Sarah A. Clayton and Richard Mackey, a manifest error hath happened to the great damage of the said Sarah A. Clayton and Richard Mackey, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this day of September, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT,
District Judge.

33 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court at Denver, in said district, this 10th day of Sept., A. D. 1879.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By , *Deputy Clerk.*

(Indorsed:) Gen'l No. . Supreme Court of the United States. Sarah A. Clayton, Richard Mackey, plaintiffs in error, vs. Sarah A. Clayton, widow, & heir, &c. Writ of error to circuit court U. S., district of Colorado. Filed in Supreme Court of the U. S. this day of , A. D. 18 . clerk, by , deputy clerk. H. M. & W. Teller, attorney' for plaintiff in error.

33½ And thereupon the following citation was issued out of said court and in said cause, to wit:

34 *Citation U. S. circuit court.*

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States to Sarah A. Clayton, widow and heir at law of James W. Clayton, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Sarah A. Clayton and Richard Mackey are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 10th day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

MOSES HALLETT, *Judge.*

35 *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

On this 11th day of Sept'r, A. D. 1879, personally appeared James M. Lomery before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to L. C. Rockwell, attorney of record of the within defendant in error.

JAMES M. LOMERY.

Sworn to and subscribed before me this 11th day of Sept'r, A. D. 1879.

[SEAL.] EDWARD F. BISHOP, *Clerk.*
By , *Deputy Clerk.*

(Indorsed:) Gen. No. . Supreme Court of the United States. Sarah A. Clayton & Richard Mackey, plaintiffs in error, vs. Sarah A. Clayton, widow & heir, &c., defendant in error. Citation. Filed in court of the U. S. this day of , A. D. 18 . . clerk, by , deputy clerk. H. M. & W. Feller, attorney for plaintiff in error.

36 *Clerk's certificate.*

DISTRICT OF COLORADO, *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings in the cause lately in said court pending, wherein Sarah A. Clayton, widow and heir at law of James W. Clayton, deceased, was

plaintiff, and Sarah A. Clayton and Richard Mackey were defendants, as fully and completely as the same still remains on file and of record in my office.

In testimony whereof I do hereunto sign my name and affix the seal of said circuit court, at Denver, in said district, this 10th day of September, A. D. 1879, and of the Independence of the United States the 104th year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

(Clerk's fees:) 86 folios, @ 10 c. & c't'fe. 8.95. Paid by H. M. & W. Teller.

(Indorsement on cover:) No. 84. Sarah A. Clayton and Richard Mackey, plaintiffs in error, vs. Sarah A. Clayton, widow & heir at law of James W. Clayton, dec'd. Colorado C. C. U. S. Filed 16th October, 1879.

JAN 2 1934

110-701

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALLISON C. CHEELEY AND ELLA CHEELEY, HEIRS OF SARAH A. CLAYTON, DECEASED, AND RICHARD W. MACKEY,
Plaintiffs in Error,
vs.
SARAH A. CLAYTON,
Defendant in Error.

STATEMENT OF FACTS, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

WILLARD TELLER,
Attorney for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALLISON C. CHEELEY AND ELLA CHEELEY, HEIRS OF SARAH A. CLAYTON, DECEASED, AND RICHARD W. MACKEY,
Plaintiffs in Error,
vs.
SARAH A. CLAYTON,
Defendant in Error.

STATEMENT OF FACTS, BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

Suit was instituted in the Circuit Court of the United States for the District of Colorado at the July Term, 1878, by the defendant in error, claiming to recover of Sarah A. Clayton, deceased, and Richard W. Mackey, possession of the undivided one-half of about 320 acres of land, situated in Jefferson county, State of Colorado, and also certain mining property, mill and mill site, in Gilpin county, Colorado.

The facts upon which title was asserted were, that the

property described in said complaint was originally the property of one James W. Clayton, deceased; that said James W. Clayton, deceased, about the 10th day of October, 1874, dying intestate; that he left him surviving two daughters and the said defendant in error, Sarah A. Clayton; and that at the time of his death, she, the said defendant in error, was the wife of said James W. Clayton; also setting forth that the matter in dispute exceeded in value the sum of $5,000; that the value of the rents, issues and profits of the mill, or the undivided one-half thereof, was $150 per month, and claiming to recover said lands, mill and mill site, and the further sum of $2,250, the value of the rents and profits of the mill.

The answer of Sarah A. Clayton, one of the defendants in said cause, denied that the said defendant in error herein, was the heir at law or the widow of the said James W. Clayton; admitted the death of the said Clayton, and that he died intestate leaving two daughters mentioned in said complaint; admitted that the said James W. Clayton, at the time of his death, was seized in fee of the real estate described in the complaint; averring further, that the said plaintiff Sarah A. Clayton was not the widow and heir at law of one-half of the estate of James W. Clayton; and averring that the said Mackey was occupying, as the tenant of the defendant and said daughters of the said James W. Clayton, deceased; denying that the plaintiff was entitled to any part or portion of the premises, and admitting that the property in dispute was worth more than $5,000.

The defendant Mackey answered, denying all knowledge as to whether or not the plaintiff was the widow of James W. Clayton, or his heir; denying that the said plaintiff was the owner in fee of the property, or entitled to the possession thereof; admitting that he was in possession of the mills and mill site, or the undivided one-

half, by leave of the said daughters of the said James W. Clayton, and of the other half by leave of his co-defendant, Sarah A. Clayton.

On the trial the case was submitted to the Court without a jury, in pursuance of a stipulation filed therein; and the Court, after hearing the evidence, made the following order, finding and judgment:

"*First*—That plaintiff and James W. Clayton intermarried at Wheeling, in the State of Virginia, on the 3d day of May, A. D. 1855.

"*Second*—That on the 1st day of March, A. D. 1867, the said James W. Clayton filed his bill for divorce, against the said plaintiff, in the District Court of Gilpin county, Colorado Territory, which was a Court of competent jurisdiction in that behalf; that the cause alleged in said bill as ground for divorce was, that the said James W. Clayton had, in 1863, taken the defendant therein, the plaintiff in this suit, to the State of Illinois, and that she, the defendant therein, had refused to return to Colorado, and had refused to live with said James W. Clayton, although he, the said James, had offered to furnish her, the defendant therein, a home and sufficient maintenance in Colorado.

"*Third*—That the plaintiff in this suit was, on the said 1st day of March, A. D. 1867, and thereafter until the present time, a citizen and resident of the State of Illinois.

"*Fourth*—That at the time of filing said bill in the District Court of Gilpin county, a summons was issued out of said Court, directed to the sheriff of said Gilpin county to execute, commanding him, the said sheriff, to summon the said plaintiff to answer the said bill, which summons was in all respects as required by the law of the Territory then in force regulating such matters.

"*Fifth*—That the said sheriff of Gilpin county, on the same 1st day of March, A. D. 1867, returned the said summons into the said District Court of Gilpin county, with his endorsement thereon that the defendant therein, the plaintiff in this suit, was not found in his county.

"*Sixth*—That a notice of the pendency of said suit in the District Court of Gilpin county was published in a weekly newspaper, printed and published in the said Gilpin county, for four weeks, beginning with and next after the 1st day of March, A. D. 1867; and the first publication of said notice was more than thirty days before the return-day of said summons; that the certificate showing such publication was to the effect that the first publication of such notice was on the 1st day of March, 1867, and the last publication was on the 26th day of March, 1867; that said certificate was filed on the 22d day of March, 1867.

"*Seventh*—That the defendant in the said divorce suit (the plaintiff in this suit) was not notified of the pendency thereof, except as aforesaid.

"*Eighth*—That a decree was entered in the said suit, brought in the said District Court of Gilpin county, on the 26th day of June, A. D. 1868, divorcing the said James W. Clayton from the defendant therein (the plaintiff in this suit), which said decree recites at the commencement thereof, 'that it appearing to the Court that due service had been had upon said defendant before the fourth day of April, 1867, and that such service had been made, according to the laws of the Territory of Colorado, and the rules and practice of that Court, more than ten (10) days previous to the first day of the April term of said Court,' and that the defendant was called and defaulted.

"*Ninth*—That the said James W. Clayton and the de-

fendant in this suit intermarried in the year 1870, at and within the State of Colorado.

"*Tenth*—That the said James W. Clayton departed this life about the 10th day of October, A. D. 1874, leaving the said plaintiff and two children, issue of his marriage with the said plaintiff, him surviving.

"*Eleventh*—That at and before the time of his death the said James W. Clayton was seized in fee of the premises described in the complaint as situated in Jefferson county.

"*Twelfth*—That at and before the time of his death the said James W. Clayton was the owner of the premises described in the complaint as situated in Gilpin county, and the said James W., in virtue of such ownership was entitled to hold, occupy and possess the same.

"*Thirteenth*—That the value of the use and occupation of the said premises since the 3d day of April, A. D. 1877, and the rents, issues and profits thereof, as to the undivided one-half part thereof, is seventeen hundred and twenty-five dollars.

"Wherefore the Court finds as a matter of law:

"*First*—That because the said defendant therein (the plaintiff in this suit,) was not properly *notified* of the pendency of said suit in the District Court of Gilpin county, the decree of divorce entered therein, was, and *is, void and of no effect.*

"*Second*—That the plaintiff in this suit, in virtue of her marriage with the said James W. Clayton was, and is, with the surviving children before mentioned, his heir at law, and as such is entitled to one-half part of his estate.

"*Third*—That the said plaintiff is the owner in fee of the undivided one-half part of the estate described in the complaint as situated in Jefferson county.

"*Fourth*—That the said plaintiff is the owner, and under the laws of the State is entitled to hold, occupy and possess the undivided one-half part of the estate described in the complaint as situated in Gilpin county.

"*Fifth*—That the said plaintiff is entitled to recover of the said defendants as and for the rents, issues and profits of said premises, and damages for the detention thereof, the sum of seventeen hundred and twenty-five dollars.

"Wherefore, let judgment be entered accordingly against the said defendants, and in favor of the said plaintiff."

And afterwards, and on the same day, to wit, the third day of March, A. D. 1879, judgment was duly entered against the said defendants on the "Judgment Book" of said Court, and in said cause, in pursuance of the statute and the rules of the Court. And the judgment order is in words and figures as follows, to wit:

"SARAH A. CLAYTON, widow and heir-at-law of JAMES W. CLAYTON, deceased,
vs.
SARAH A. CLAYTON and RICHARD MACKEY.

Judgment for possession of real property and for damages.

"On this third day of March, A. D. 1879, the same being one of the regular judicial days of the December Term, A. D. 1878, of said Court, there being present the Honorable Moses Hallett, District Judge, it is considered by the Court that the said plaintiff do have and recover of and from the said defendants, possession of the undivided half of the premises in the complaint mentioned, to wit:

"The southeast one-quarter (¼) of the southeast one-

quarter (¼) of section eleven (11), township three (3) south, of range seventy (70) west; also the north one-half (½) of the northwest one-quarter (¼) of section thirteen (13), township three (3) south, of range seventy (70) west; the east one-half (½) of the northeast one-quarter (¼) and east one-half (½) of the southeast one-quarter (¼) section fourteen (14), township three (3) south, of range seventy (70) west; the south one-half (½) of the northwest one-quarter (¼), and west one-half (½) of the southwest one-quarter (¼) of section thirteen (13), township three (3) south, range seventy (70) west; all of said property situate in Jefferson county, Colorado. Also, the American Flag lode, being three hundred (300) consecutive feet along the vein thereof, and being claims numbers two, three and four, east from the discovery claim on said lode, by fifty feet in width, which said claims commence at the east end of the American Flag Gold Mining Company's property and extends easterly therefrom a distance of three hundred (300) feet. Also, a mill site, situate in said Nevada mining district, and between and bounded by the mill site formerly owned and known as the Symonds and Mallory mill site on the east, and by the Douglas and Becker mill site on the west, and in width extending from gulch to gulch; on which site there are two quartz mills, both operated and run by one steam engine; also, the stables, houses and office; which mill site extends up and down the gulch for the space of two hundred and fifty (250) feet, and from bank to bank across the gulch, and known as the Clayton mill site, situate in the county of Gilpin and State of Colorado, and that she have a writ of possession therefor.

"It is further considered by the Court that the said plaintiff do have and recover of the said defendants one thousand seven hundred and twenty-five dollars ($1,725), her rents, issues, profits, and damages for the wrongful

withholding thereof, in form heretofore assessed, and her costs by her in this behalf laid out and expended, or to be laid out and expended, to be taxed, and have execution therefor."

To which finding and judgment the defendants, by their attorney at law, except.

Afterwards, and on the 13th day of May, 1879, said judgment was vacated and a new trial ordered, which said last order was, on the 22d day of July, 1879, and at the May term of said Court, vacated; and the case comes to this Court on writ of error from the judgment and finding as above set forth.

It will be seen that the facts in this case are all set forth in the finding of the Court, and there is no dispute in respect thereto.

The question is entirely one of law and relates to the force and effect of the decree in the divorce suit between the said James W. Clayton, deceased, and the defendant in error in this case, plaintiff in the Court below.

The plaintiff in error, Sarah A. Clayton, having intermarried with Allison C. Cheeley, died in 1882, leaving as her heirs Allison C. Cheeley and Ella Cheeley, and this case is revived in the name of her heirs on stipulation filed in this cause.

On this record we assign for error, and propose here to consider and discuss:

First—Error in the finding and judgment of the Court in refusing to give to the decree in the divorce suit between James W. Clayton and the plaintiff in this suit the force and effect to which it was entitled, and in finding such judgment void, and in finding that the plaintiff in the suit below was entitled to maintain any action as the heir and widow of the said James W. Clayton, deceased.

The laws under which this divorce was obtained, were the laws of the Territory of Colorado, as they existed prior

to the admission of the State of Colorado, and are as follows:

Chapter 26 of the Revised Statutes of Colorado, sections 1st, 2d and 8th: "SECTION 1. In any case in which a marriage has been, or hereafter may be, contracted and solemnized between any two persons, and it shall be adjudged in the manner hereinafter provided, that either party at the time of the marriage was, and continued to be, impotent naturally, or that he or she had a wife or husband living at the time of such marriage, or that either party has committed adultery subsequent to the marriage, or has wilfully deserted and absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year, or that a husband has wilfully deserted and absented himself from his wife and departed from this Territory, without any intention of returning, or that either party has been guilty of habitual drunkenness for the space of two years, or been guilty of extreme cruelty, or been convicted of felony, or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract; but no such divorce shall in anywise affect the legitimacy of the children of such marriage, except in case where the marriage shall be declared void on the ground of a prior marriage."

"SEC. 2. The District Court, sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony, by this chapter allowed; and the like process, practice and proceedings shall be had, as are usually had in other cases in chancery, except as hereinafter provided, and except that the answer of the defendant need not be under oath."

"SEC. 3. The same rule of proceedings shall be had as in other cases in chancery, and upon the hearing the Court shall have the power to decree a dissolution of the

bonds of matrimony, if the causes mentioned in this chapter are proven to exist."

Also the statutes relating to chancery proceedings in said Territory, chapter 13, Revised Statutes of Colorado, sections 5, 6, 7, 8, 9, 10, 11, 12 and 15, as follows:

"SEC. 5. Upon the filing of every bill as aforesaid, the clerk of the Court aforesaid, shall thereupon issue a summons, directed to the sheriff of the county in which the defendant resides, if the defendant be a resident of this Territory, requiring him to appear and answer the bill on the return day of the summons; and where there are several defendants, residing in different counties, a separate summons shall be issued to each county, including all the defendants residing therein."

"SEC. 6. Every summons shall be tested in the name of the clerk of the Court out of which it may issue, shall bear the seal of the Court and the signature of its clerk; shall be dated of the day it issues, and be made returnable to the next term of the Court after the date thereof."

"SEC. 7. Service of summons shall be made by reading the same to the defendant, or leaving a copy at his usual place of abode, with some white person of the family, of the age of ten years or upwards, and informing such person of the contents thereof; which service shall be at least ten days before the return day of the summons."

"SEC. 8. Whenever any complainant shall file, in the office of the clerk of the Court in which his suit is pending, an affidavit showing that a defendant resides or hath gone out of this Territory, or, on due inquiry, cannot be found, or is concealed within this Territory, so that process cannot be served upon him, the clerk shall cause publication to be made in some newspaper published in his county, and if there be no newspaper published in his county, then in a newspaper published in this Territory,

containing notice of the pendency of such suit, the names of the parties thereto, the title of the Court, and the time and place of the return of the summons in the case; such publication to be made for four successive weeks, the first of which shall be at least thirty days before the return day of such summons. But this proceeding shall not dispense with the usual exertion, on the part of the sheriff, to serve the summons."

"SEC. 9. If thirty days shall not intervene, between filing such affidavit and the return day of the summons, and the summons shall not be served, the cause shall be continued to the next term; if thirty days shall intervene as aforesaid, or if service of process shall be made, and the defendant shall not appear on the return day of the summons, the bill may be taken for confessed."

"SEC. 10. If, for want of due publication or service, the cause shall be continued, the same proceeding shall be had at the succeeding term of the Court, as may have been had at the term to which said summons shall be returnable.

"SEC. 11. If, in any suit in chancery, the process shall not be returned, executed, on the return day thereof, the clerk, if required, shall issue an alias, pluries, or other process, without an order of the Court therefor.

"SEC. 12. The complainant may cause a copy of the bill or petition, together with a notice of the commencement of the suit, to be delivered to any defendant residing or being without this Territory, not less than thirty days previous to the commencement of the term at which such defendant is required to appear; which service, when proved to the satisfaction of the Court, by the oath or deposition of any person competent to be a witness in the cause, shall be as effectual as if such service had been made in the usual form within the limits of this Territory.

"SEC. 15. When any final decree shall be entered

against any defendant, who shall not have been summoned or notified to appear, as required by this chapter, and such person, his heirs, devisees, executor, administrator, or other legal representative, as the case may require, shall, within one year after notice in writing given him or them, of such decree, or within three years after such decree, if no such notice shall have been given as aforesaid, appear in open Court and petition to be heard touching the matter of such decree, and shall pay such costs as the Court shall deem reasonable in that behalf; the person so petitioning may appear and answer the complainant's bill, and thereupon such proceedings shall be had, as if the defendants had appeared in due season, and no decree had been made. The decree shall, after three years from the making thereof, if not set aside in the manner aforesaid, be deemed and adjudged confirmed against such non-resident defendant, and all persons claiming under him, by virtue of any act done subsequent to the commencement of such suit; and at the end of the three years, the Court may make such further order in the premises as shall be required and shall be just."

BRIEF AND ARGUMENT.

From this statement of facts and the law, as above set forth, it will be seen that the sole and only ground upon which the plaintiff was allowed to recover in the Court below was that, by reason of the invalidity of the decree, said to have been entered in the county of Gilpin, between the said plaintiff and the said James W. Clayton, deceased, the said plaintiff therein had never been legally divorced from the said James W. Clayton, deceased, and hence that the defendant in the Court below, Sarah A. Clayton, was not the heir of the said James W. Clayton, deceased; and we have assigned for error that the Court thus erred in

adjudging said decree void, and in support of our proposition we submit the following:

First—The validity of a decree in chancery under the statutes above cited and the general practice of Courts of Chancery does not depend on actual notice to the defendant therein.

See sections above quoted, seven to thirteen.
1 Daniel's Chancery Practice, 564, U. S. Equity rules, No. 13.
Tunnel vs. Griggs, 2 Scammon, 365.
People vs. Craft, 7 Paige, 325.
Coit vs. Hamm, 30 Conn., 195.
Hahn vs. Kelly, 34 Cal., 415.

Nor does the validity of any decree in chancery depend upon personal service being had upon the defendant, for in all the cases cited, service by leaving a copy at the defendant's house is equivalent to personal service, either by statute or the practice.

So too of publication in chancery; the notice, when published according to law, becomes effectual, and the defendant is bound thereby, although he never heard of it. The presumption that he did, is so far conclusive that a judgment on a complete service of this kind can never be attacked collaterally, or even directly, on the ground that the defendant had not actually heard of, or received the notice, an object of the law being to make an end of litigation; the judgment is valid and final in all cases except, as under the statutes of Colorado, when taken up for review, or unless that finality is stayed, as in section 15, Revised Statutes of Colorado, above referred to.

By reference to the sections above cited, it will be seen that they provide for three kinds of service, to wit, personal, by summons, (section 7,) by publication, (sections 8 and 9,) and a mixed service, (section 12,) by service of a copy

of the bill and notice, which latter, as regards the subject matter of the bill, has the same effect, and the judgment is as personal as one obtained by personal service or by publication; and the effect given to the words of section 12 as to service "made in the usual form within the limits of the Territory," must be to make the judgment rendered with service under the 12th section, subject to be set aside on motion, precisely the same as though obtained under sections 8 and 9.

The service under section 12 is allowed no greater effect than one by publication, although it is more personal; yet a judgment on service by summons within the State is final, while the service by publication or personal service without the State is not final; in both cases where made by publication, or out of the State by copy of bill and notice, the time is thirty days, by summons ten days.

The conclusion is irresistible that the place and time of service are determinative of the quality of the judgment as to finality, rather than the form of notice or fact of actual notice.

It follows from this then, since there may be three different kinds of service and two kinds of judgments, that the inquiry, when sufficiency of service is questioned, must always be directed to the particular service upon which the judgment is claimed to have been rendered, and the inquiry must be whether there has been a substantial compliance with the requirements of the law as to that particular service. If there has been, then no matter how many or how few efforts to procure another and different service may have been made, the particular service will be good unless such efforts to procure a different service is a condition precedent to the right to that particular one.

The sole and only objection to the validity of the decree in the divorce suit is found in the fact that the summons

issued therein was returned *non est inventus* on the same day that it was issued. There is no objection made that the publication was not made for the time, and in the words prescribed by the statute, but the assumption is that the return of the summons on the same day it was issued renders the service by publication *null* and *void*, and that wholly upon the ground that the provisions of section eight, and the last two lines thereof, to wit, "But this proceeding shall not dispense with the usual exertions on the part of the sheriff to serve the summons," made the detention of the summons in the hands of the sheriff until the return day thereof an indispensable prerequisite to valid service by publication; in other words, it was claimed by the Court below, that the service by publication was null and void, for the reason that the sheriff having returned the summons on the day it was issued, thereby dispensed with the usual exertion to serve the summons, and that this being against the provisions of the statute, rendered the publication null.

In our view, no such nullity of this particular service can be found therein, since there was a substantial compliance with the law as to form, time and method of such particular service, although there may have been a failure to comply with all the requirements of the law as to concurrent acts respecting another and different service.

An omission to try to get one service cannot, we think, invalidate acts which were directed towards getting another, unless such omitted acts were in some way calculated to render that particular service less complete, or the omitted acts were necessary to a right to obtain the particular one. And in no case, where the right to commence the particular service did not depend on acts omitted, can such omission be held to invalidate such service, except when the omitted acts went to the completion and making of the particular service.

In all cases the sufficiency of service and the kind of service is determined by the kind of judgment asked.

The Globe, 2 Blach., 427.
Freeman on Judg., Sec. 609, *et seq.*

The judgment in the case of divorce between James W. Clayton and Sarah A. Clayton, was asked in 1867, on the ground that the defendant then *had refused* to live with plaintiff, and had since 1863, been absent from the Territory of Colorado, and had resided and then resided in Illinois. (See Finding and Judgment, 2.) The relief asked was for divorce *only*, and the judgment was thus directed wholly *against* the *status* of the parties, was a judgment *in rem*, and the service required was not an actual or personal one. No authorities need be cited, for the assertion that the Courts of nearly, if not every State in the Union, hold that service in such a case, may be a personal, or a constructive, or substituted service, and that the latter is equally as valid as the former in obtaining a judgment of dissolution of the marriage relation. In no case of this kind is judgment had upon the ground that such service binds the *person* or is a personal one, but that it *acts* upon the *status* of the parties, that is, the married relation, and this married relation is the subject matter of the suit.

The case is one where the status of the plaintiff as a citizen of the State, the State laws, and control over the marriage relation determines the question of jurisdiction. The marriage relation stands in the place of property; the jurisdiction attaches, not by reason of the notice, but *ex necessitate*, on account of the status of the plaintiff, the right of the Legislature to prescribe laws as to dissolution of the marriage contract. These judgments of divorce against non-residents are *sui generis*, but the text books, as well as all the cases, put them in the catagory of judgments *in rem*, and for the reasons above given, and all,

without exception, repudiate the idea that the judgment in such cases is ever rendered on the ground of jurisdiction of the person of the defendant, or that such personal jurisdiction is necessary when the notice is by publication, however perfect such notice, or by actual service outside of the State. And this distinction as to judgments in divorce cases is specially recognized by the United States Supreme Court in the case of Pennoyer vs. Neff, 95 U. S., 734-5. The doctrine is also clearly laid down in Cooley's Const. Lim., pp. 400* to 407*, in which it is said the "notice (made out of State) cannot be made to stand in place of process," etc., and yet in the case under review, the only real objection was that notice being irregular, gave no jurisdiction of the person of defendant. We refer also on this point to 2 Bishop on M. & D., sections 138, 143-4-5; and also 155, 156.

In 2 Bishop, M. & D., 147, he says, "An action *in rem* is maintainable when the Court has no jurisdiction over the parties, but only over the subject matter."

In section 156 of 2 Bishop on M. & D., it is said "the decree in such cases is not directly binding on the person, unless he appears or is personally served;" and in section 137, *Ibid.*, the subject matter is shown to be the *status* of the plaintiff. Marriage is a status, and a divorce suit acts upon it, and it becomes and is the subject matter.

Story on Conflict of Laws, Sec. 230.
2 B. on M. & D., 141 and 164.
Freeman on Judgments, Sec. 610.

A proceeding *in rem* is an exception to the general rule, and binds the *res* in absence of personal notice.

Story on Conflict of Laws, Secs. 52, 592.
The Globe, 2 Blatchf., 431.

A judgment *in rem* is defined to be "the judgment of a

Court declaratory of the nature and condition of some particular thing, or of the condition and status of some particular person." "It is a proceeding instituted against the thing or subject matter to determine its status."

Freeman on Judgments, Sec. 606.
Woodruff vs. Taylor, 20 Ver., 65.
Smith's Leading Cases, Vol. 2, 660.

"Judgments *in rem* are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages."

Freeman on Judgments, Sec. 606.

"In treating of judgments *in personam*, we found that the first and most material inquiry in regard to an apparant record was in reference to the jurisdiction of the Court from which the record was produced; that the first jurisdictional inquiry was, whether the Court had authority over the subject matter, and the second was, whether it had authority over the parties. A judgment *in rem*, at least when against any *thing*, binds the *res*, in the absence of any personal notice to the parties interested. *Those parties, even in the absence of personal notice*, are to be regarded as parties to the suit. Therefore, in a large number of cases involving the effect of judgments and decrees *in rem*, no inquiry in regard to jurisdiction over the persons interested is material; but even in these cases two jurisdictional inquiries must be answered in the affirmative, in order to uphold the judgment or decree, viz: 1st. Did the Court have the authority to determine the subject matter of the controversy? 2d. Did the Court have jurisdiction over the thing proceeded against as a defendant? The answer to the first inquiry must, as in the case of judgments *in personam*, be found in the laws creating the Court and designating its general author-

ity." Freeman on Judgments, Sec. 611. And he cites in support of the doctrine here laid down: The Globe, 2 Blatch., 427; and Bauducs Syndics vs. Nicholson, 4 Miller, Lou., 81; Thorn vs. Southard, 2 Dana, 475; Burn vs. Fletcher, 23 U. C. Q. B., 36.

See also, for an elaborate discussion of this doctrine, the case of—

Ditson vs. Ditson, 4 R. I., 87, *et seq.*
Hardy vs. Alden, 9 Me., 140.

In the case under review there is no question as to the power of the Court to make a decree in a proper case, nor of the thing proceeded against, which was the marriage relation between plaintiff and defendant, and since to dissolve that relation no personal service was required, it is plain that no failure to try and procure an unnecessary service can render a service, otherwise valid, a void one. In cases in attachment and foreclosure, and in libel in admiralty, *in rem*, it has been decided that even an entire failure to give any notice, did not render judgments *in rem* void.

In Lessee of Parvis vs. Moreland, 15 O., 445, it is held that *in rem* jurisdiction attaches to the thing, and though no publication is had, when the statute requires it, yet the judgment is not void. So, too, in matter of Clark, 3 Denio, 167, and Drake on Att., 447, 448. The reason is, jurisdiction does not depend, and is not got upon, notice on absent defendant, but attaches to the *res*, in divorce cases, to the status of plaintiff and the law of the marriage relation. "The purpose of the notice is not to give jurisdiction, but to banish the idea of secrecy and fraud in the proceedings, by inviting publicity to it, and to give to persons out of the jurisdiction every chance possible under the circumstances of appearing and defending if they will." Ditson vs. Ditson, 4 R. I., 106.

In 15 Ohio, 445, the notice in suits *in rem* is said to be not for the purpose of giving the Court jurisdiction over the subject matter, "but to permit the debtor to have an opportunity to be heard. The distinction is between a lack of power or want of jurisdiction in the Court, and a defective execution of it. In the first instance the judgment is void; in the second, only voidable." In this case jurisdiction is acquired on the filing of the bill and the issue of summons, for it is self-evident if the notice out of the State, or publication within, does not bind defendant *in personam*, as all authorities say, it cannot confer jurisdiction: hence jurisdiction of the subject matter is got by filing the bill and issuing summons, for there is no other way to acquire it in case of an absent party, there being no way known to the law by which he can be reached so as to give jurisdiction, and a suit commenced when the Court has no jurisdiction of the subject matter, is a nullity. The jurisdiction, then, like every case *in rem*, attaches by reason of the subject matter being within the power of the Court to hear and determine upon the question presented as the status of the party, and not by force of any process served or to be served. Jurisdiction having once attached, the Court had the right to proceed and give judgment, but it is claimed that a circumstance then happened that deprives the Court of that power. It is, then, error, and error only; it is not void, but voidable. The principle everywhere recognized is, that jurisdiction once having attached, no mere error can make judgment void, and that even when jurisdiction is got, by issue of a writ, on a defective affidavit, when such affidavit was preliminary, still the judgment could be sustained." Cooper vs. Reynolds, 10 Wall., 319.

Again, jurisdiction in divorce cases is peculiar. It does not in any case depend wholly on personal service. Unlike other cases, it cannot be given by consent of parties,

although the Court has jurisdiction of the subject matter, and hence as personal presence cannot give jurisdiction, so a failure to obtain personal service or appearance, or of any service at all, cannot be grounds upon which the Court can be adjudged without jurisdiction, since it is derived from another source. Much less can it be said that a failure to make efforts to procure a service not necessary (to wit, a personal one), can oust it of jurisdiction.

II.

We come now to consider what was necessary to the service in that case, so as to warrant the rendition of a judgment, not necessarily a final, but a *valid one*, and one that, except upon review, would become a final one under the statute.

First—Let it be observed, that by the statutes above cited, all proceedings for divorce were governed by the chancery practice, and that by such practice, even without any statute, a judgment on service by publication, was good.

The first statute upon the subject under the English practice, was that of 5 Geo. 4, Chapt. 25; 1 Daniels, Ch. Pr., 270; but the practice was long anterior thereto, hence a proceeding of this kind is not to be judged of as though the right was conferred by statute alone. Courts of equity have always exercised special powers as to substituted service, without the aid of any statutes.

Freeman on Judgments, Sec. 127.
3 Black. Com., 283, 444.
Hahn vs. Kelly, 34 Cal., 417.

Second—Again, we think it a question of doubt whether in any case when defendant is alleged to have been a non-resident in the bill, and when affidavit is filed showing such non-residence, the statute relating to summons in chancery, requires the issuance of a summons, whether a subpœna within the ordinary chancery practice, upon filing a bill alleging the party was out of the State and so beyond the reach of a subpœna, was or was not necessary, we need not stop to inquire, since if that was the fact section 5 of the statute above quoted evidently changes that rule; and whether it changes it or not, it certainly lays down a rule and provides, "That upon filing of every bill as aforesaid, the clerk of the Court aforesaid shall thereupon issue a summons directed to the sheriff of the county in which the defendant resides, *if the defendant be a resident of the Territory.*" Which, as we say, at least inferentially says no summons need issue if the bill or affidavit shows, and if the fact is, that the defendant does not reside in the Territory. Besides this, it would seem to be a vain thing to issue summons when no service by summons was expected, and the bill showed that such service could not be had. And if it be true that the statute has made issuance and return of summons necessary only when defendant resides in the Territory, then certainly a failure to return a summons, or too early a return, cannot affect the validity of publication. But however that may be, we insist that even with strict compliance with the statutes as required, we need only, having filed our bill, first, cause a subpœna to issue; second, file affidavit of non-residence; third, cause publication to be made in a newspaper in the county of a notice of pending suit, name of parties, title of Court, time and place of the return of summons; and if the notice be published for four weeks, and the first publication be thirty days before return day of summons, the service was complete. For it must be

observed, that so far from the statute making any efforts to procure a personal service a prerequisite to a right to, or a valid service by publication, it does not even provide for such efforts in any way—it simply recognizes the fact that such efforts were required by the common law and practice, and simply provides that the fact of an affidavit filed and publication begun did not relieve the officer from his duty in respect to the summons.

By sections 5 and 6, in all cases a summons must be issued upon filing the bill, and by section 8 the proceedings by publication "shall not dispense with the usual exertions *on part of the sheriff* to serve the summons." The inquiry now is, the impracticability of personal service by summons being shown by affidavit, as by law required, and a notice sufficient in form, and published for the time required, being undenied, can the fact that the sheriff returned the summons *non est inventus,* on the same day the plaintiff begun his constructive service, be taken to render the service by publication so incomplete as to make the judgment rendered in the cause on such constructive service, a nullity, and wholly void, or was the act of the sheriff but an irregularity in the proceedings, rendering it voidable only, good until reversed by a direct proceeding, and not to be attacked collaterally? Upon this we say, the omission of the sheriff, if shown, to make the usual exertions, does not render the judgment void, but voidable only. And in support of such judgment on our part, we call attention to the fact that—

First—These two services are independent of each other.

Second—The sheriff is the only actor in the one case, in getting service, and the plaintiff publisher, the other.

Third—That by the statute, section 11, in all cases where summons is returned not served on return day, the cause

is continued, and *no other summons* need issue, although one may issue if required.

Fourth—It results from this, that every case of service by publication, in which the publication is not begun thirty days before return day, the publication may be going on, and unless a second summons is got out, must go on without any writ in the hands of the sheriff, and if a return in the one case makes it certain that the "usual exertions on the part of sheriff" to obtain personal service were dispensed with, it is equally certain that such exertions may be held dispensed with when he had no writ, the writ being returned at return day, and no other being issued. Certainly, if plaintiff might or might not sue out a second writ, his failure to do so can invalidate nothing.

Fifth—If, then, the law itself has expressly recognized the fact that a publication which by its very terms (Secs. 9, 10 and 11,) can be begun and carried on at any time after suit is begun and affidavit filed, and after the return day of summons, and when no summons is in the hands of the sheriff, is it not almost uncontrovertable, that an omission of the sheriff to retain the summons in the first instance, and a return thereof before the return day, is not such an error as renders the notice by publication void? If these two kinds of service, both of which are legal, each to be obtained in a different way by different forms, are so essential, the one to the other, that an omission of the sheriff to try and obtain service of the writ, after the plaintiff has begun to obtain the other service, invalidates that other, how does it come that the Legislature, in the next two sections, expressly dispenses with such exertions in all cases except that of writs to the first term? If such acts were so intimately connected relating to the writ, at the first term, why are they wholly divorced

as to all subsequent terms, by the provision that no *alias* writ need issue, but only may issue if plaintiff requires?

Sixth—We submit, further, that the mere returning of the writ does not show that "usual exertions" were not had, and that if it did, those "usual exertions" were in no sense a condition precedent, either as to plaintiff's right to constructive service, or to its completeness and validity. The duty to make the "usual exertions" to make personal service, was not prescribed by, and was in no wise dependent on any statute, much less upon the statute relating to constructive service; and as all presumptions are in favor of the judgment, and of the fact that the sheriff did his duty, and did not "dispense with the usual exertions," no Court has authority for holding either that such exertions were not made, or that if not made, such omission invalidates the publication. There is nothing in the record that shows whether such exertions were or were not made, and hence the presumption exists that they were, and we need cite no authorities on this point.

Seventh—Again we say, sections 8, 9, 10 and 11, of the chancery act, above quoted, appears to be conclusive upon the point that the Legislative intent was not fixed upon a personal service, so as to render invalid a constructive one, simply because after constructive service had been begun, the sheriff might not be in a condition to get a personal one, and hence the position that the judgment was void is not well founded, for it was at the worst a defective service only, since personal service was neither necessary or expected, and, for the reason stated both in the complaint and affidavit, and admitted to have existed in the finding in this case, up to the trial of the first suit, to wit, the absence of the defendant, could not have been had. The distinction between no service and a defective one is too well known to need authority, but at the risk of super-

fluity, we cite authority on the point that a defective service, no matter what the defect may be, the Court having jurisdiction of the subject matter, does not render the judgment void.

Cooper vs. Reynolds, 10 Wall., 308.
Voorhees vs. Bank of U. S., 10 Peters, 449.
Hendricks vs. Whittemore, 105 Mass., 24.
Freeman vs. Leonard, 7 Allen, 54.
Smith vs. Pomeroy, 2 Dill., 420.
Peck vs. Strauss, 33 Cal., 678.
Mooney vs. Maas, 22 Iowa, 380.

In all such cases the judgment is valid except upon review. How much more so must it be in this case, where, by statute, (Sec. 15,) it is made valid in terms after the lapse of three years. This Court has held that in the Courts of the United States judgments are not void, even if the record fails to show jurisdiction.

Ex Parte Watkins, 3 Peters, 193.

And this is believed to be true of all superior Courts of general jurisdiction and of record.

Lastly, on this point, we say in the case at bar, not only does the voidness of the judgment in divorce, as decided at the Circuit Court, appear only by inference and presumption, but also in the face of the record, since, by the finding, (section 8,) it is seen that the decree recites, at the commencement thereof, that "it appearing to the Court that due service had been had upon said defendant before the 4th day of April, 1867, and that such service had been made according to the laws of Colorado Territory, and the rules and practice of the Court, more than ten days prior to the first day of the April term of said Court." This shows that the question of due and proper service was adjudicated by the Court, and this being so, the judg-

ment cannot be void, since it is well settled that such a finding is as conclusive upon the parties in all collateral proceedings as any adjudicaton of the Court can be; the Court had jurisdiction of the subject matter, and no jurisdiction of person aside from that by publication was necessary.

Freeman on Judgments, Sec. 130.
Hahn vs. Kelly, 34 Cal., 391.
Quivy vs. Porter, 37 Cal., 458.

In this last case it was held that the judgment could not be attacked collaterally, and that the general rule is that "jurisdiction of a superior Court will be conclusively presumed unless a want of jurisdiction appears upon the *face of the record* when it is offered in evidence;" and further, that although the record might show service on the wrong person, yet if *the record elsewhere stated that due service had been had on defendant*, it would be sufficient. And in McCauly vs. Fulton, 44 Cal., 361, the Court says, "It has repeatedly been held by this Court that upon collateral attacks recitals in the judgment of service upon the defendant are conclusive of the question of jurisdiction, where the judgment is rendered by a Court of superior jurisdiction." In Turner vs. Jenkins, 79 Ill., "Every reasonable presumption will be indulged in favor of the jurisdiction of a Court of general jurisdiction, and its finding in a decree that defendants were duly summoned will be held to be *prima facie evidence of the existence of the jurisdictional fact*," and so this Court held in Comstock vs. Crowfield, 3 Wall., 396.

The case of Ferguson vs. Crawford, 70 N. Y., 253, and cases cited are to the same effect, and the Court, page 258, says:

"After considerable research, I have been unable to find a single authoritative adjudication in this, or any

other State, deciding that in the case of a domestic judgment of a Court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring States, holding that, in case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the Court over the person as well as the subject matter, *unless it appear on the face of the record that the Court had not acquired jurisdiction*; and that in such cases there is a conclusive presumption of law, that jurisdiction was acquired by service of process or the appearance of the party;" and on page 265, The true rule is said to be that "jurisdiction in all cases of superior Courts is presumed till the contrary appear by evidence," which we submit does not appear in this case. See also—

Hunt vs. Hunt, 72 N. Y., 217.

In Fahes vs. Darling, 82 Ill., 142, the Court says: "Whether defendants had the constructive notice required by the rules and practice of the Court to bring them before the Court and give jurisdiction to proceed, was *one* of the questions the Court had to determine before rendering a judgment. *The determination is final and conclusive unless set aside by this Court on direct application for that purpose.*"

In Kilgour vs. Gockly, 83 Ill., 109, "When a decree by its recitals shows jurisdiction, the burden of proof rests upon the party denying the jurisdiction, and he must produce the best evidence in his power."

In Sloan vs. Graham, 85 Ill., 26, the Court holds, that the presumption that Court acted on sufficient proof of sufficient service by publication, is so strong that although the notice and certificate on record did not show it, yet this failure did not overcome the presumption, and the decree was held a valid one.

In Lessee, etc., vs. Craig's Heirs, 14 Pet., 154, the Court says: "It *does not* follow that no notices were given, because none appear upon the record."

In Pennoyer vs. Neff, 5 Otto, 714, there was defective evidence of service, yet the Court held the judgment could not be attacked collaterally.

We submit, now, that in this case the defendant in divorce, and the plaintiff in this case, submitted *no* evidence at all as to the sufficiency of the notice, she had three years to set aside such judgment, if notice was insufficient, on motion, and five years after that in which to reach it in a direct proceeding for error. She also had every opportunity in this case to show that the *service* was defective in the divorce case by showing that the sheriff had no summons in his hands, if that was necessary; or that he did *not* make the usual exertions to get personal service, if that was necessary, or that personal service could have been had, if that was the fact; but with this burden upon her, she shows nothing, lies by from 1868 to 1876, without objection of any kind to the validity of the decree of divorce, then comes into Court, *not* to question the errors of the Court, but to contend that the judgment is void. She comes, too, not to prove that she had no notice, or that the evidence of that notice is insufficient, but to assert that the sheriff did not *exert* himself to give her a personal notice, and that, too, in the face of the fact that the ground upon which divorce was asked, as shown by the bill, and the ground upon which the right to a substituted constructive service was claimed, was her absence from the Territory, and the impossibility of procuring a personal service. She offers no proof, she makes no denial, she asserts no fraud in fact, simply relying upon the record, which shows the summons returned *not found*, the day publication was begun. She asserts that the recital of the decree, which shows that "due service was *had*," is a *lie*, and

the judgment wholly void, and that, too, not upon an affirmation in the record, but upon an inference that because one thing was done, another was not done, although the uselessness of doing the latter she tacitly admits.

What then becomes of the presumption that belongs to the acts of superior Courts, that they have jurisdiction and rightfully exercise it? What becomes of the rule everywhere recognized, that the recital of the judgment as to service, is *prima facie* evidence of it? What becomes of the rule, disputed by nobody, that errors in the adjudication of a Court do not render the judgment void? What becomes of the rule that a presumptive *prima facie* case must be overthrown by proof, since no proof is offered? Shall the solemn adjudication of the Court, evidenced by recital in the decree of "due service had," be of so little worth that an inference derived from the record though it be, shall make it void? To say the most, the omission to show summons in hands of the sheriff, if this was necessary to a valid service by publication, appears only presumptively. Shall this presumption override and outweigh the adjudication of the Court? The Court in chancery, either because it *had* proof other than appears of record, or because it did *not* deem proof of summons in hands of sheriff necessary, or because it held that although not in his hands, yet, the usual exertions to procure personal service had not been dispensed with, or because it adjudged that if the sheriff had not made the usual exertions, the service by publication was still good, or for all of these reasons, adjudged and decreed that it had acquired jurisdiction, and that due service had been had. Now, in either event the Court adjudicates, and I care not whether such adjudication be right or wrong, it is its judgment, and so far as the parties are concerned it is a valid one. Take the last supposition that the Court below held, as a matter of law, on construction of the

chancery act, and especially of the eighth section, that the omission of the sheriff to make the usual exertions, or the fact that he had no summons in hand, it having been returned, while publication was going on, was not such an omission as rendered the service by publication invalid? Will any Court say that it was not the judgment of the Court, and as such entitled to be obeyed and respected, until reversed? If any Court will say this, it must be done in the face of the decision of every Appellate Court in the Union where the point has been raised. No case can be found where a defective service of this kind, or of any kind, in the absence of fraud, where the record shows an adjudication therein, has ever been held a void service and the judgment open to collateral attack.

If, as the Constitution of the Union provides, "full faith and credit are to be given in each State, to the acts, records and judicial proceedings of every other State," how much more ought the full faith and credit be given by the Courts of the United States to the judicial proceedings of a Court of general jurisdiction of the same Territory?

Shall the Circuit Court of the eighth circuit act as an Appellate Court? review the proceedings or refuse to give credit to the judicial finding and judgment of the District Court of Colorado Territory of 1868? That is what has been done and of what we complain, for aside from all questions as to such review of a Territorial Court by by the Circuit, this Court has held that "no court of equity can turn itself into a court of review and correct the errors of a court of law." Tilton vs. Cofield, 93 U. S., 167; and, *a fortiori*, a court of law cannot review the proceedings of a court of equity, much less can it adjudge that although the court of equity adjudged that service had been had according to the statute, and in accordance with its rules and practice, yet it may hold such

finding void and of no effect, though no evidence to contradict the record was given or offered.

In our discussion thus far we have said nothing of the distinction between wanting jurisdiction and irregularity in obtaining it. In the one case the judgment may be void; in the other voidable only,—though in many cases the Court having jurisdiction of the subject matter, the judgment may be voidable only, though *no notice was given.*

Peck vs. Strauss, 33 Cal., 685.
Dorente vs. Sullivan, 7 Cal., 279.
Borde vs. State, 6 Eng. (Ark. R.), 519, 552.
Walbrige vs. Hall, 3d Vt., 114.

Under a statute identical with that of Colorado, the courts of Illinois have passed upon the validity of service, but in no case has it been held that summons having issued and a notice by publication sufficient in form having been published, the service was void, although the judgment might be voidable. In the case of Smith vs. Trimble, 27 Ill., 152, and McDaniel vs. Cornell, 19 Ill., 226, the judgments were held void, because no summons had issued; and it was said that the statute expressly require issue of summons before any publication was authorized; but that is not the case at bar, since summons was issued, the publication was not had till afterward, and the statute (Secs. 5 and 8) provides that publication may be begun at once after the bill and affidavit have been filed. Nor had any adjudication of the Supreme Court of Colorado ever held more than that a return of the writ before the return day rendered the judgment void, but voidable only, up to the decree in the case of Clayton vs. Clark & Clayton, 4 Colo., 410, to which we shall presently refer. The only cases, except the last, in our courts are the cases of Vance vs. Mahoney, 2 Colo., 47, and Palmer vs. Cowdry 2 Colo. 1,

which was a case on appeal. We submit that the rule to be derived from all these cases is, that for mere defects, whether of affidavit, of service, or return of service, or want of defaults, the judgment is voidable and not void, and can be attacked collaterally only when there is no jurisdiction of the subject matter in the Court, or no attempt to get a service; and on this point we call special attention to Voorhes vs. Bank of U. S., 10 Peters, 449, where there was no affidavit, no proof of notice, as required by law, and no default; yet the judgment was held voidable only. So in—

Elliott vs. Peirsol, 1 Pet., 340.
Wilcox vs. Jackson, 13 Pet., 511.
William vs. Berry, 8 How., 541.

It is held that, if the Court has *no* jurisdiction of the *matter*, or if, as it is said, the Court is acting "beyond the *pale* of its authority," then and then only, as we read the decisions, are its judgments void. A defective service, where an honest attempt has been made to get a complete service, is sufficient to obtain a judgment secure against collateral attack, whatever may be said of it on review, in all cases where jurisdiction of subject matter exists and no personal service is necessary. And this brings us to the only remaining points to be discussed herein, viz: the effect of Sec. 15 of the chancery act, under which the divorce suit was begun and completed, and the effect that must be given to the decision in the case of Clayton vs. Clark & Clayton, 4 Colo., 410. We call attention to the latter point before discussion of the former. By reference to that decision, it will be seen that it is upon the fifteenth section, and that the Court holds that this "section has in contemplation cases where there has been a constructive service *only*, not cases of defective constructive service; that it affects the status of the de-

cree as a final decree,—not its status as a valid decree," and that in this view said section had no bearing upon the admission of the evidence of the decree in the divorce case, because, as it is said, page 416, "the record showing non-residence of the defendant and the return of summons *non est inventus* on day it was issued, made such evidence inadmissible." Certainly, in view of the facts, and in view of the law above cited, as to the *prima facie* character, at least of the finding of *due* service had, the conclusion of the Court is not only unwarranted, but it is in the face of both that law and the presumption that must be indulged in to support the judgment; nor can this decision be sustained by reference to the statute, since it neither directly or by inference makes the right to the beginning or completion of a service by publication in any manner dependent upon the *date* of the return, nor even upon any dispensing with efforts to procure a personal service. But, however that may be, we submit that this Court is not bound, nor was the Circuit Court bound, by that decision, for,

First—The decision, though nominally upon a statute, is really upon a general question of chancery practice, to wit, the question of notice to non-residents, when an actual personal notice was unnecessary to the obtainment of relief asked.

Second—The decision in that case was on an appeal taken from the District Court of the Territory of Colorado, on the 1st day of July, 1876, before the admission of the State, was taken to the Supreme Court of the Territory, and of which this Court was a Court of Review; the chancery act, above cited, was repealed March 17th, 1877, and the decision in the Supreme Court of the State was rendered Feb. 28th, 1879; and hence it follows that this section 15 was not, at the time of the decision in this case, March 3d, 1879, a law of the State, and this Court is under no obli-

gation to follow a decision based upon such repealed law. When this appeal was taken, this Court, and this Court alone, was the Court entitled to interpret this statute. The law, as we have said, was repealed before the State Court passed upon it, and neither by U. S. Statute, Sec. 721, nor by the decision of this Court, is this Court bound by the decision of the Supreme Court of the State of Colorado. Besides, as we have already seen, the question under review arises upon a service that is not necessarily a statutory one, since Courts of Equity, by common law, and without any statute, have always had their rules and practice, by which constructive notice to non-residents were had, and hence the Court may determine the validity of a service, like this, without referring to the statute. It is a question of a general nature, it is not based on a local statute or usage, but on a general practice.

Boyce vs. Tabb, 18 Wall., 546.
Swift vs. Tyson, 16 Peters, 1.
Watson vs. Tarply, 18 How., 522.
Delmas vs. Insurance Co., 14 Wall., 665.
Olcott vs. Board of Supervisors, 16 Wall., 689.

It is not a decision upon a local question, or one that is peculiar to the State, since both the obligations of the sheriff not to dispense with the usual efforts, and the right to service by publication, exists by common law. Besides, this decision is the first and only one of the State Court, and since the law was repealed in 1877, it is not likely there will be another; it was made cotemporaneous with the decision in this case, and it is thought quite probable that the State Court followed the lead of the Circuit, rather than the Circuit that of the State.

And this brings us to the discussion of section 15 and its effect upon the decree in the divorce suit. The language is, "When any final decree shall be entered

against any defendant, who shall not have been summoned or notified to appear *as required by this chapter*," etc., the defendant "or his representative, may, within one year after notice, or within three years after rendition of decree, come in and defend as though no decree had been rendered," etc. This, it is said, refers to "cases where there has been constructive service only, not cases of defective constructive service. It affects the status of the decree as a final decree, not its status as a valid decree." The words "not summoned or notified as required by this chapter," certainly do not necessarily refer to cases of *constructive service only*, for the notification provided for by that chapter included three kinds of notice, personal within the State, constructive within the State by publication, and statutory by copy of bill without the Territory, (see Sects. 7, 8 and 12.)

Nor is there anything in the reason of the statute that warrants such a conclusion. The object of the statute is to give validity and stability to decrees in chancery, by curing defects of every kind as well as irregularities and defects of one service as another; and to say that it refers only to constructive service, and even then excludes all questions of irregularity and defects in that service, is to decide arbitrarily and without reason, for in all cases of this kind remedial in character, as this act is, the construction must be that which will, if the language will admit of it, most effectually meet the end in view, and should be liberally construed.

Potter's Dwarris on St., 231, 236.

And it needs nothing but a common sense application of the statutes, in connection with legal principles, to find that both in letter and in spirit the statute was designed to cover any and all service, and to cure defects that might have been good against the decree on review. So

too, the idea that it "affects the status of the decree as a final one and not as a valid decree," is little short of absurd. To the average mind, validity would appear to be a prerequisite to finality; to the judicial mind, in this decision, it appears to be of no consequence; and the legislative intent is held to have been so fixed on the finality of the judgment, that it cared nothing about its validity. The absurdity of the position is apparent in the case itself; the sole and only objection to the decree as stated is, that the "return of the writ before the return day would not support a notice by publication, and left the Court without authority to pronounce a judgment;" in other words, it is contended that the judgment having been rendered without authority, was void, because party was not notified as required by statute. The statute says, if he was not so notified, it shall become a final judgment at the end of three years, and the decision is, that since the lack of authority arose from a defect in the service, it does not cover the case, though if there had been no service by publication, as required by the statute, it would then, by virtue of this section, have become a final judgment at the end of three years. Such a holding on this section accords neither with the language or purpose of the statute and is inconsistent with any sound rule of reason or interpretation of statutes. We submit then that the real nature of this section 15 is that of a remedial and curative statute, designed, as we have already said, to correct and cure irregularities and defects of service, so as to give validity to the judgments obtained in chancery, either on a service by publication or otherwise, where the question could properly arise whether there had, or had not been a service as required by the said chapter, and to make such judgment final at the end of three years, despite the defects, if the party did not come in and defend. If a party had not been summoned as required by the act, and if, as

the Court held, section 15 had reference only to notice by publication, and did not even then have any reference to a defective service by publication, it is clear that it could apply and take effect only when the service was not defective but complete, or to cases where no service, or attempt at service had been had or required by that chapter, or as the statute has it "had not been summoned or notified as required by that chapter." If applied to the former, it is in the face of the statute, because it is when the defendant has not been summoned or notified that the statute applies; and if to the latter, or when no service was had or attempted, it will cover the case at bar, since no service is equivalent to a void service.

The decision not only restricts the section to one class of cases only, without any warrant therefor, but reverses the statute, holding that it means the exact opposite of what it says. Beside, the statute having used the words "summoned or notified," it must be held to refer to cases where judgment might be entered, either when no summons or notice had been served, either personally by publication, or when such summons and notification was defective, or *both;* and it is certainly not too much to ask a Court to find, that since the language is broad enough to cover a case where no service was had as required by that chapter, it was intended to include the less, to wit, to cover and cure defects, if any, in such service, or in the steps preliminary thereto. And this is all that is needed in this case. Here was an honest attempt to get a complete and valid service, and the service itself is complete; but it is said that some preliminary thereto was wanting; that the service was *not* had as required by the statute; that the sheriff, whose duty it was to keep the summons, returned the same and thus made the service sought to be obtained by the plaintiff, defective. The one was the act of the sheriff relating to one service, the other

the act of plaintiff, relating to another; both might have been concurrently had, and hence neither one was a precedent to a right to the other. There are grave doubts whether this section ought to be held to apply to a divorce suit, for the obvious reason that a judgment of divorce that left the parties on the ragged edge of doubt, whether they were married or divorced, for a period of three years, would be against good policy, and might be productive of great evils; but as the Supreme Court of Illinois, in the case of Lawrence vs. Lawrence, 73 Ill., 577, has so decided upon a statute identical with ours, we accept that decision as the rule in this cause; and we hold that since it must be apparent that a judgment in a divorce case should, when no fraud, actual or attempted, is claimed, be sustained, if a fair construction of the law, and the presumption in favor of such judgment will support it, that the right of inheritance, the legitimacy of children, the best interests of society and the protection of innocent parties, all require that the judgment in divorce suits be not lightly and needlessly set aside when there has been an honest effort on part of plaintiff, and an open, honest adjudication on the part of the Court; and we submit that it was not only wise in the Legislature to provide a cure for such immaterial defects, as are shown in the service in this case, but it is the duty of Courts to advance the remedy and cure, if possible, the defects. And viewing it in this light, we contend that the two sections, 8 and 15, being parts of same act, and relating to one subject matter, must be taken together as providing *what* kind of service shall be sufficient to warrant a judgment, how made, and when final judgment shall be rendered. And by a well-known rule, if by the the exact terms or by established construction by the Courts of the eighth section, there is any conflict between it and the fifteenth, in respect to the subject matter, or

kind of service, the former must give way, and the latter section is allowed either to amend, or repeal so far as necessary, the former; or it may be taken as merely declaratory of the requirements of law of such former section.

The right of a Legislature to validate legal proceedings, notwithstanding irregularities apparent therein, is well established, and has been too often recognized to need discussion or authorities.

But see Cooley's Const. Lim., p. 371 to 381.

Even a *retrospective* statute curing defects in legal proceedings is valid.

Cooley, Const. Lim., 371.

"The Legislature may prescribe the rules under which the judicial power is exercised by the Courts, and in doing so it may dispense with any of those formalities which are essential to the jurisdiction of the Court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with, by statute, after the proceedings have been taken, if the Court has failed to observe any of those formalities."

Cooley's Const. Lim., 107.

The rule is, if the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by a subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature *might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.*

Cooley's Const. Lim., 371.

Now, it is self-evident that if the rule applies to enactments complete in themselves, but of different dates, it must *a fortiori* apply to a case of this kind, when the *latter* enactment is by a section of the same act.

Let us inquire, then, was it competent for the Legislature to have made immaterial the omission of the sheriff to hold writ until return day? Was it competent for the Legislature to have provided that such publication should be made, at any time after return of summons "not found"? If it was, then it is clearly competent, by the rule above laid down, for it to provide a curative act, when such provisions *had not been* complied with, that if the summons was thus returned at once, the matter should be deemed immaterial, and the judgment hold good.

Besides this right to a service of publication not being founded on the return of the sheriff, but upon affidavit, even if the party had been within the Territory at that time, or came in afterward, and no personal s
had, the service by publication would have
[redacted] at least so as to make judgment [redacted]
upon Service
Jermain vs. Langdon, 8 Paige, 41.

That it was thus competent can scarcely be questioned, since some of the States had actually provided that the publication should be made only upon the return of "not found."

See Laws Iowa, 1851, page 252.

In New York, all that is required is, that the fact that party cannot be found, shall appear by affidavit, to the satisfaction of the Court, and no requirement as to return of summons. And in Colorado, under our Code, there is no provision that requires any retention of the summons, or that it even go to the sheriff at all, or that any efforts be made to serve it, when it appears by affidavit that the party cannot be found. So, too, in Courts of equity of the

United States, by section 738, it will be seen that Congress has omitted to provide for any attempt at execution of summons, or said a word about return thereof before publication; nor is any provision for such requirements made by the rules of Court. All that the rule requires is issuance of summons; all the law requires is, that it should be shown defendant is a non-resident, the publication may be had on order of Court.

We think, then, that it cannot be successfully denied that it was clearly competent for the Legislature of Colorado to have provided that summons having issued, it might be returned at once, or that it must be returned before publication could be had; and that being so, it was equally competent for it to say, that whether summons was returned at once, or retained until return day, was so immaterial that if return of summons had been made, it should be cured by notice after one year, or without notice and by lapse of time after three years, as it did in section 15. There can be no question, we think, that all these requirements for a constructive service under any system or code, is wholly a matter for legislative adjustment; and that as it possessed full power in the first instance to say what should be done in the same act or by a subsequent act, it might amend, modify, repeal or alter any of these requirements, and might declare, as it has done in this case, to what extent, and attempt to comply with the law should be regarded as sufficient to validate the act of Court; and this Court has, in the case of Mechanics Bank vs. Union Bank, 22 Wall., 298, virtually decided the legislative power would extend to validate a judgment, even in cases where the Court in giving it may have transcended its jurisdiction.

In conclusion, we submit that neither by the law as applied to the practice of Courts of equity, without a statute, or by a proper application of the statute of Colo-

rado Territory relating thereto, and under which the divorce judgment was obtained, nor by any of the recognized rules of law regarding the validity of judgments and the presumptions in their favor, can the ruling at the circuit be maintained. Nor, as it seems to us, can this Court, under the facts presented here, thus allow a party, on the merest technicality, with no suggestion even of fraud, and with every evidence of good faith on part of plaintiff, to treat a judgment thus obtained of a Court of competent jurisdiction, got in the usual way and upon competent proof, after the death of the plaintiff, as a nullity, and thus unsettle titles, blacken alike the memory of the dead and the character of the living, render children illigitimate, criminate innocent parties and scandalize a community. And all this in the face of the fact, undenied and undeniable, that the party who thus seeks to set aside and annul the judgment, never from 1863 to 1878 was a resident or within the Territory or State, and was never in position, so that the utmost efforts of the sheriff could have obtained a service, and no service except that by publication was ever possible; thus holding, at the best, that the doing of a vain thing, or rather not holding one's self ready to do what the record admits, could not have been done, or not making efforts to do what by reason of the absence of the defendant could not be effective, was enough to neutralize all efforts founded on such absence, affidavit and publication, however perfect the latter might be.

We respectfully submit that the judgment of the Circuit Court was an error, and should be reversed.

WILLARD TELLER,
Attorney for Plaintiffs in Error.

110-701

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALLISON C. CHEELEY and ELLA CHEELEY, heirs of SARAH A. CLAYTON, deceased, and RICHARD W. MACKEY,
Plaintiffs in Error,
vs.
SARAH A. CLAYTON,
Defendant in Error.

No. 84.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

BY L. C. ROCKWELL,
Her Attorney.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

ALLISON C. CHEELEY and ELLA CHEELEY, heirs of SARAH A. CLAYTON, deceased, and RICHARD W. MACKEY,
Plaintiffs in Error,
vs.
SARAH A. CLAYTON,
Defendant in Error.

No. 84.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

If errors have been assigned upon this record, to answer the rules of this Court, to entitle the judgment below to be reviewed, then, appellee claims this judgment must be affirmed, whether it was or was not error in the Court below, in holding the decree of divorce between James W.

Clayton and defendant in error void. Because a case involving the identical issues made in this action was tried between the two Sarah A. Claytons, each claiming to be the widow and heir at law of James W. Clayton, deceased, in the District Court of the Second Judicial District, sitting in the late Territory, now State of Colorado, in and for the county of Gilpin, in May, 1876, and the Court found the issues for the present defendant in error, who was plaintiff in the last named action, which was ejectment, which judgment was taken by appeal to the Supreme Court of Colorado, and there reviewed and affirmed by said Court in 1878, after the admission of the State into the Union, which opinion is found in 4 Colorado Reports, 410. And inasmuch as the State Court has had under consideration the decree of divorce now asked to be considered, and has held the decree void because there was no service upon the present defendant in error, who was defendant in the divorce suit brought in the District Court of Gilpin county in March, 1867, by James W. Clayton, through whom these parties claim title, this Court is bound by that adjudication: *that no sufficient service of summons or other notice was ever made upon the present defendant in error* in the original divorce case, and was an adjudication, that the *jurisdiction of the District Court over the present defendant in error* in that divorce proceeding, *never attached;* that such adjudication by the District and Supreme Courts upon the rights of the parties, constituted the law of this case and settled all further controversy between them as to the character of that decree. And the Circuit Court of the United States was bound to treat that decree as void, in which event defendant in error was the owner of and entitled to recover the property sued for as widow and heir of James W. Clayton.

The action referred to embraced all the property situate in Gilpin county, in the State of Colorado, owned by

James W. Clayton at the time of his death. The present action was also one in ejectment, brought in the Circuit Court of the United States, and included certain grounds in Jefferson county, in addition to the identical ground sued for in Gilpin county in the first suit. The only difference between the two actions is, in the first one, James Clark was made defendant with Sarah A. Clayton, the lady claiming to be the last wife of J. W., and in the present action Richard W. Mackey was made co-defendant with the last named Sarah A. Clayton, and defended under her title as tenant. Therefore the case is to be treated, so far as this judgment is concerned, as a direct adjudication upon the rights of the two Sarah A. Claytons, each claiming to be the widow and heir at law of James W. Clayton, deceased.

Gilpin vs. Paige, 18 Wallace, 350.
Pennoyer vs. Neff, 5 Otto, 714.

In Meister vs. Moore, 6 Otto, 76, this Court said it would accept as binding upon it the decision of the Supreme Court of Michigan, wherein it declared what acts would constitute a valid marriage under the laws of that State. The converse of that proposition must be true; that this Court will accept as binding upon it, a decision of the Supreme Court of Colorado between the parties in interest to this record, that no valid divorce had ever been obtained between defendant in error and James W. Clayton.

The Supreme Court of Colorado, has at its present session, in Israel vs. Arthur *et als*, reviewed its decision in the case of Clayton vs. Clayton, *supra*, and approved the same, which opinion is not yet printed, but a certified copy of it is attached to this argument; also, in the case of Palmer vs. Cowdrey, 2 Colo., 1, and Vances' heirs vs. Maroney, 4 Colo., 47, the Supreme Court of this State has given a construction to the chancery act as to what is

necessary to make good service in the District Courts under that law as it existed at the time the divorce proceedings were instituted and consummated, to the effect, that unless the summons was held by the sheriff until return day, the clerk was not authorized to publish notice, as provided in section 8 of the chancery act. (See where same is quoted in counsel's argument, pp. 8, 9 and 10.) And all proceedings predicated and based upon such notice of publication were void, and any judgment the Court might attempt to render, wherein constructive notice was assumed to be made by reason of such published notice, was void. The Court will observe the statute provides the summons shall be made returnable on the first day of the term of the Court next following the date thereof (section 6.) The Supreme Court of the State having declared that defendant in error was the heir of James W. Clayton, and that plaintiff in error was not such heir, that adjudication becomes the law of this case.

But should this Court think otherwise it must, I think, arrive at the conclusion the decree of divorce was void, in which event the judgment below must be affirmed.

That decree was void for two reasons:

First—Because the statute of Colorado did not authorize a decree against a wife who never was in Colorado, or who departed from the Territory without any intention of returning.

Second—Because the District Court acquired no jurisdiction over the person of the defendant in error in the proceedings for divorce. Upon the first point the Circuit Court find:

"*First*—That James W. Clayton intermarried with defendant in error at Wheeling, in the State of Virginia, in May, 1855.

"*Second*—That in March, 1867, he filed his bill for di-

vorce against her in the District Court of Gilpin County, and alleged as grounds for the divorce, that he had, in 1863, taken her to the State of Illinois, and she had refused to return to Colorado with him, and had refused to live with said Clayton, although he had often requested her to do so, and had offered to furnish her a home and sufficient maintainance in Colorado. (Folio 20.)

"*Third*—That defendant in error was on the first day of March, 1867, when the divorce proceedings were instituted, and thereafter, until this action was tried, a citizen and resident of the State of Illinois."

Accepting these findings to be true, it will be seen there was no desertion by defendant in error from James W. Clayton in Colorado; her domicile was not there, neither was she there in person. In some States, for the purpose of divorce, the wife can have a separate domicilation from the husband. But in Colorado that question is more than doubtful. While the statute prescribes desertion by a wife as a cause for divorce, that does not presuppose an absence from the State. Desertion may take place and the parties live under the same roof. When either of the parties, regardless of his or her marriage duty and plighted faith, ceases, without just cause, to discharge towards the other those high and solemn obligations which the marriage relation imposes, it is desertion.

First Bishop on M. & D., Ch. 38, title "Desertion."

The statute of Colorado authorizes a wife to bring her libel against her husband who had wilfully deserted her and absented himself from her and departed from the Territory without any intention of returning. This law, expressly naming the wilful absence from the State of a husband as a cause for divorce, is the same as declaring that such absence of the wife from the State would not be a cause. *Expressio unius est exclusio alterius.* I find no

statute like Colorado's in this particular. The Court below found as a fact there was no specific allegation that defendant in error ever wilfully departed and absented herself from her husband without any reasonable cause for the space of one whole year next before the filing of the bill. Unless this Court draws that conclusion from the facts found, the Court had no jurisdiction of the subject matter, because the fact she was without the Territory, is no ground for granting the divorce, and the decree is void for that reason. If she refused to come to Colorado the libel should have been filed in Illinois. The statute evidently contemplates personal service upon the wife. Counsel has considered the proceeding for divorce as one *in rem*. It is not that at all. There is no *res*, nothing which the law can seize or condemn, as in admiralty or attachment cases.

The Revised Statute of Colorado, Ch. 40, p. 68, Sec. 1, says: "Marriage is considered in law a civil contract to which the consent of the parties is essential." Eminent law writers have defined it to be an *institution* and a *contract* which deeply concerns the State, which the parties who enter into it alone can constitute, but which they can rescind or modify only by permission of the State for causes which it designates.

2 Kent's Com., p. 96, Sec. 27.
1 Bishop on M. & D., Sec. 3-11, (4th ed.)
Story Con. of L., Sec. 200.

In divorce cases the Court can only act upon the status of the parties within its jurisdiction and determine his or her rights. The judgment is strictly one *inter parties*. A decree of divorce is as much a proceeding *inter parties* as any action on contract. There is no subject matter upon which the jurisdiction rests, which may be transferred,

with one of the parties, or without either, from one forum to another.

Lyon vs. Lyon, 2 Gray, (Mass.) 367.
Pawling vs. Birds' Exrs., 13 John. R., 192.
Dorsey vs. Dorsey, 7 Watts., (Pa.,) 349.
Maguire vs. Maguire, 7 Dana, (Ky.,) 181.

It is no distinct subject matter independent of the parties, as in actions on contract or of tort, neither is the jurisdiction of the Court affected by the consent of the parties. The jurisdiction is not under the control of the parties. They cannot dissolve the relation at will nor effect that result by consenting to a decree. If there be connivance the Court would be without jurisdiction, because the statute expressly says the Court shall not grant a decree when that fact appears. In short, the Court must have jurisdiction of the subject matter in a case for divorce wholly independent of any consent of the parties, and must *proceed* upon *proofs* and not upon their concessions. And, too, the Court must have jurisdiction of both of the parties. What then is meant by subject matter in a suit for divorce? It must be the cause or causes, act or acts which constitute the cause of action. These are not migratory but strictly local, and depend upon the law of the State where the parties are domiciled at the time they occur; hence the subject matter of a suit for divorce can only occur where the parties are at the time domiciled. As we have seen, it is a matter in which the State has a direct and abiding interest independent of the parties. But whatever the ground of jurisdiction of Courts in divorce cases is, it must be admitted judgment can only be rendered where there is personal or constructive service.

We are now brought to the second proposition; that the Court had no jurisdiction over the person of the defendant in error, and the decree is therefore void.

Irby vs. Wilson, 1 Dev., and Bratt., where Chief Justice Ruffin uses the following language: "This was a case where the parties married in South Carolina and removed to Tennessee, where the parties were domiciled, and, living unhappy, the wife returned to her relatives in North Carolina. Six years after she left the State the husband instituted proceedings and obtained a divorce, the validity of which here came under consideration. There was no service of process upon the wife, and she did not appear." The Judge said: "The decree of the Court of Tennessee was altogether inoperative and null; it was not an adjudication between any parties. One State cannot send process into another. The Constitution of the United States, in providing that full faith and credit shall be given to the judicial proceedings of one State in the Courts of another, intended only to render the record of a suit *inter parties* conclusive; not to enable a State to assume jurisdiction of persons without her boundaries and dispense with the service of process. It was intended to restrain one State from disregarding the judicial sentences rendered in another *between parties or on things* within it. There can be no valid adjudication unless there *be a thing or persons before the Court.* Without that, what purports to be an adjudication is a perfect nullity, and binds one person no more than it does another; one being named in the proceedings and not served with process within the State, is the same as if he were not named."

Kerr vs. Kerr, 41 N. Y., 272, was a case like this one. Two women claimed to be the wife of Kerr at the time of his death, and as such had the right to receive letters of administration. But the Court held, that inasmuch as the Court of Indiana did not acquire jurisdiction of the person of the first Mrs. Kerr, the decree of divorce was void and she was the lawful widow of Mr. Kerr, and had the

right to receive the letters. In this case the record showed an appearance of Mrs. Kerr, by attorneys, but on proof that she never authorized any appearance, nor knew of the suit, the decree was held void, and the supposed judgment might be attacked collaterally.

Thatcher vs. Powell, 6 Wheat., 127.
Buchanan vs. Rucker, 9 East., 192.
Bissell vs. Briggs, 9 Mass., 462.
Steel vs. Smith, 7 Watts and Serg., 451.
Jordan vs. Giblin, 12 Cal., 100.

Where the Court says, p. 102, "In proceedings of this character, where service is attempted in modes different from the course of the common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression."

Ricketson vs. Richardson, 26 Cal., 149, where it is held that "a failure to comply *in every particular*, with the rule prescribed by the statute, to obtain service by publication, is fatal."

But the doctrine of Galpin vs. Paige, 18 Wall., *supra*, is decisive of this case.

Counsel says, p. 27: "I have been unable to find a single authoritative adjudication deciding, that in the case of a domestic judgment of a Court of general jurisdiction, want of jurisdiction may be shown by extrinsic evidence."

Counsel has failed to observe the language used by this Court in Pennoyer vs. Neff, 5 Otto, at 732, wherein it is said, (in speaking of judgments rendered without service, that they were void when sued upon in other States,) "In several of the cases the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that *in such State* it may be valid and binding. But if the Court has no jurisdiction over

the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State. * * * In the later cases this language is repeated with less frequency than formerly; it is beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered." And cases cited from Missouri, Iowa and Indiana, in support of this proposition.

The Supreme Court of Colorado held the same way in reviewing the judgment of Clayton vs. Clayton. This was not an instance of defective service. It was a case of no service. And the record in the divorce proceedings not only affirmatively showed that defendant in error was a non-resident at the time of the commencement of those proceedings, but that the necessary steps were not taken to obtain service upon her. All things done in that direction appear in the record and made it self-destroying. It may be true, where the recitals in a decree are to the effect "that it appeared to the Court, service had been had," would sustain it against collateral attack if those recitals were not overcome by other portions of the record more controlling, showing such recitals to have been false. The complaint, return on summons, affidavit of non-residence, in fact every paper in the divorce suit, showed conclusively Mrs. Clayton was then a non-resident of Colorado. Add to these admissions of complain-

ant the further fact, no summons was issued and in the hands of the sheriff at the time this notice was being published, the proof in the record is irresistible that the Court proceeded to render a decree without jurisdiction.

The Supreme Court of Colorado has decided in 1873, in Palmer vs. Cowdrey, *supra*, that the publication of notice alone gave the Court no jurisdiction over the defendant. And such has been the uniform construction of the chancery act by the Supreme Court of Colorado, in several instances, as is shown by the cases cited in this brief. The Supreme Court of Illinois had also previously announced the same doctrine upon a statute exactly like the one under consideration.

Smith vs. Trimble, *et al.*, 27 Ill., 152.

McDaniels vs. Cornell, 19 Ill., 226, where it is said the absence of summons cannot be supplied, its existence must appear in the record, and properly returned *non est*.

Jacobus vs. Smith, 14 Ill., 359, where the Illinois statute is quoted.

There is no difference between issuing no summons, and issuing and returning it the same hour, unless defendant is served with it. The aim, object and purpose of a summons is defeated if the sheriff never carries it out of the clerk's office. The record was no more complete as it now appears than if no writ had ever been issued, nor publication made. It is utterly indefensible.

The record below showed too much for the gentlemen's proposition.

The Supreme Court in Clayton vs. Clayton, *supra*, expressly ruled, that the recitals in the decree in this case were shown to be false by other portions of the record, and the record was self-destructive and conclusively showed the Court acted without jurisdiction.

Yet counsel, page 30, ask, what is to be done with certain presumptions attaching to the acts of Superior Courts? that they have jurisdiction and rightfully exercised it? And of recitals in the decree or judgment, that "due service was had?" I reply, treat all such presumptions, and recitals, as nullities, when the record, as in this case, shows them to be absolutely false.

Counsel further say, page 29 of their argument, that defendant in error offered no proof of defective service in the divorce suit by showing that the sheriff had no summons in his hands, or that he did not make the usual exertion to get personal service. Why should she? The record, upon which plaintiff in error relies to cut off and destroy defendant in error's title as heir, furnished all the testimony necessary upon that point. She could rely upon the record offered by plaintiff in error, to show the Court acted without jurisdiction over her. But the publication of the notice as contained in the record, is wholly insufficient to give the Court jurisdiction.

The Court finds as a fact (folio 21), that the publication of notice was in a weekly paper for four weeks beginning with and next after the first day of March, 1867, and the first publication of said notice was more than thirty days before the return day of said summons. The certificate of the publisher attached to the notice, (which is likened unto the return of a sheriff,) shows such publication was to the effect, that the first publication of such notice was on the first day of March, 1867; that said certificate was filed in said cause on the 22d day of March, 1867. The certificate destroyed the notice. If you take March 1st for the first insertion and the 26th for the last, it was short by at least two days. But the record recites, the return was filed in the Clerk's office on March 22d, and where there is conflict as to dates the record of filing

will govern. But that is a matter of no moment, as either date will destroy its legal effect.

In Taylor vs. Connor, 7 Ind., 120, the Court says: "The statute requires the publication of the notice four weeks in the newspaper. Now when the statute prescribes a certain thing to be done to constitute constructive notice of a suit or legal proceeding, does it not take all of that thing to make notice? A part would seem to amount to nothing. The statute in this case said: Publish four weeks in the newspaper and the Court will have jurisdiction. But the statute was not complied with and it would seem to follow that there was no jurisdiction. No discretion was left to the Court as to what should constitute notice. The statute was plain in its requirement. No judicial question arises upon its meaning."

I respectfully submit, the judgment should be affirmed.

L. C. ROCKWELL,
Attorney for Defendant in Error.

DECISION.

ABBIE A. ISRAEL, *Plaintiff in Error,* *vs.* JAMES B. ARTHUR, *admr., et als.,* *Defendants in Error.*	*Error to the County Court of Larimer.*

HELM, J. This action was brought by plaintiff in error in the Court below, for the purpose of establishing her right to the estate of John Arthur, deceased, as sole surviving heir at law. Plaintiff was married to the said Arthur in 1859; there was no issue from the marriage, and unless divorced, plaintiff was his wife at the date of his decease, and entitled under the statute, there being no will, to inherit his entire estate.

Defendants in the Court below were, deceased's brother, who was also administrator of the estate, and certain nephews and neices, who were interested therein as heirs, provided plaintiff failed in establishing her right thereto.

At the trial the Court admitted, over plaintiff's objection, the records and judgments in two divorce actions brought against her by the said John Arthur during his lifetime.

The first of said actions was instituted in the Probate Court of Larimer County, and on February 9th, 1875, a decree of divorce was granted therein. The second was brought in the County Court of said county, and on June 12th, 1877, a similar decree was again entered.

Two of the errors assigned, attack the correctness of the Court's rulings, admitting in evidence the records of the divorce suits.

The Code of Civil Procedure did not become a law until October, 1877, and consequently both of these actions were brought, and the service of process therein was attempted under the practice prevailing in Colorado before

that instrument was adopted. Each of the records admitted in evidence shows on its face that the summons was issued and returned on the same day, and that the Court relied for its jurisdiction over the person of defendant, upon an attempted service of notice by publication.

In obtaining constructive service in this way, a strict compliance with the method pointed out by statute must be observed. While experience demonstrates that this mode of giving a Court jurisdiction of the person is necessary in many instances, yet Courts are jealous of abuses in the application thereof. They tolerate the omission of no material step required by law in connection therewith. The statute at the time these actions for divorce were commenced, commanded the "usual exertion on the part of the sheriff to serve the summons," notwithstanding the proceedings by publication.

Revised Statutes of Colorado, Ch. 13, Sec. 8.

And it has been held by this Court that in divorce suits under that practice, "a return *non inventus* before the return day of the writ, would not support a notice by publication, and left the Court without authority to proceed to judgment."

Clayton *et al.* vs. Clayton's Heirs, etc., 4 Colo., 410.
Vance's heirs vs. Maroney, etc., 4 Colo., 47.
Palmer vs. Cowdrey, 2 Colo., 6.

Neither the Probate nor the County Court in these actions had obtained jurisdiction over the person of defendant; both were without authority to "proceed to judgment," and consequently both decrees were absolutely void.

But it is argued by counsel, first, that these decrees are not subject to collateral attack in this proceeding; second, that in any event, the finding of the County Court in the latter, that "due service by publication has been had on

said defendant," is conclusive upon the question of service, and fortifies *that* decree against such an attack.

There is some conflict of authority upon the question as to whether, in an attempt to secure constructive service by publication, any presumption of regularity will be indulged in, the record being entirely silent. It has been held that a compliance with the material requirements of the statute must appear on the face of the record. On the other hand, Courts of high authority have announced that such presumptions are applicable to the proceedings of Courts of superior jurisdiction, whether such proceedings rest upon actual or constructive service. It is unnecessary, however, for us in the case at bar to determine this question.

For whether the record is not silent on this subject, and where it affirmatively appears therein that the Court did not have jurisdiction of the person, certainly no such presumption can be indulged in.

Clayton vs. Clayton, *supra*.
Galpin vs. Paige, 18 Wallace, 336.

And the finding in one of these records that due service of process has been had, is not conclusive. We are not prepared to accept without qualification, the doctrine upon this subject stated in Goudy *et al.* vs. Hall, 30 Ill., 116, relied upon by counsel for plaintiff in error; the opinion in that case *seems* to hold, that the finding in the record of due and legal service is only *prima facie* evidence of that fact, and may be attacked in a collateral proceeding. Interpreted or understood without condition, it modifies the beneficent rule that judicial records import absolute verity; and its effect would be to subject them in many instances to collateral attack where upon principle and authority they should be held conclusive.

In Harris vs. Lester *et al.*, 80 Ill., 307, the Court use the

following language with reference to a similar finding of service by the Court which tried the cause: "In all collateral proceedings, we entertain no doubt such finding is sufficient evidence of service by publication, as to defendants, nothing appearing in the record to the contrary, and to warrant the decree as in cases of regular notice by publication." This may fairly be said to modify the position taken in Goudy vs. Hall; and is, we think, in accord with the weight of authority.

It sanctions the view that where, as in the case under consideration, the record expressly recites the facts relied upon as constituting service, and those facts show clearly that no jurisdiction of the person was obtained thereby, it would be absurd to pronounce conclusive and binding, a declaration therein that legal service was had. The record stultifies itself and is not protected by the rule that such findings are decisive of the question in collateral proceedings.

The divorce records before us, were offered by the parties to be directly and materially benefitted thereby, and we are clearly of opinion that they were subject to collateral investigation.

In 1877 the Legislature passed the following act, which was approved by the Governor on the first day of March, viz:

"Whereas, the Probate Courts of certain counties have heretofore exercised jurisdiction in divorce cases, and various parties have obtained decrees of said Courts granting divorces with the belief that the Courts possessed jurisdiction in relation to said matters; and, whereas, doubts exist as to the validity of said proceedings, and as to the right of said Courts to exercise jurisdiction in the said matters;

"Therefore be it enacted as aforesaid;

"That all proceedings of any Probate Courts, the juris-

diction of which is, or may be questioned as aforesaid, heretofore had in any case, so far as the same or any part thereof relate to the matters aforesaid, and to the jurisdic- of the Court therein, be, and the same are in all respects legalized."

General Laws, Sec. 925.

It was generally supposed that the Probate Courts of the Territory of Colorado had no jurisdiction in divorce proceedings; that such actions could only be brought and determined in the District Court. The correctness of this supposition is questionable in view of the chancery jurisdiction conferred upon Probate Courts by the amendment to the territorial organic act, approved March 2, 1863.

Revised Statutes, p. 38, Sec. 3.

But the State Legislature, as appears from the foregoing act, shared sufficiently in the general belief on the subject, to attempt to neutralize the effect of the supposed errors in question.

Counsel for defendants in error contend that this legislative enactment rendered valid and binding the decree of the Probate Court in 1875. They argue that although in that case the Court may have had no jurisdiction either of the subject matter, or of the person of defendant, this act was intended to, and did cover and cure these defects.

Our State Constitution provides that the General Assembly shall pass no local or special laws for granting divorces. This provision deprives the Legislature of the authority existing under the territorial organization to divorce husband and wife by statute. It still has power to declare what shall be necessary to constitute a valid marriage, and what grounds shall be sufficient to authorize a divorce; it may also provide the method of procedure by the Courts upon application thereto for such re-

lief. But it cannot, under this constitutional provision, assume judicial powers, and sever the bonds of matrimony in a given case.

If the Legislature, in 1877, could not do this directly, could it accomplish the same result indirectly? Could it by statute give vitality to the decree of a Court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

The Legislature may by statute validate judicial proceedings where the statute is only in aid thereof and tends to support the same by precluding parties from taking advantage of errors or irregularities which do not affect their *substantial rights*. But it cannot by retrospective legislation, give validity to previous judicial proceedings which were void for want of jurisdiction over the parties. Two reasons may be assigned for this inhibition:

First—Because it would be an exercise of judicial power not contemplated by our constitution. (See Art. 3.)

Second—Because it would operate to deprive parties of their "day in Court;" property rights might be divested without notice to those interested, and without giving them the opportunity to be heard.

See Sec. 25, Bill of Rights.
Mason vs. Eldred, 6 Wallace, 239.
Cooley on Const. Lims., * 107, and cases cited in notes.

A decree of divorce generally affects the property rights of the parties as well as their marital relations.

Israel vs. Arthur, 2 Colo. L. R., 319.

"Upon this question we cannot doubt or hesitate. They (the Legislature) can no more impart binding efficacy to a void proceeding than they can take one man's property

from him and give it to another. Indeed, to do the one is to accomplish the other."

McDaniel vs. Correll, 19 Ill., 226.

"If it was competent for the Legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered, when before he was not bound at all; for such is the direct result. It is a proposition not to be discussed at this day, that the Legislature has no such power."

Nelson vs. Roundtree, 23 Wis., 370.
See Pryor vs. Downey, 50 Cal., 403.
See Wade on Retroactive Laws, Sec. 164.

The statute of 1877 cannot be held to cure the defect of want of jurisdiction over the person of defendant in the divorce action of 1875. It is doubtful if the Legislature intended this statute to produce any such consequence. The act itself, viewed in the light of the "*whereases*" prefixed thereto, seems to indicate that it was simply the intention to remedy the defect of want of jurisdiction over the subject matter, where the Court had complied with the law in obtaining jurisdiction over the person. It is unnecessary for us to consider the constitutionality of the act in this view of its supposed design and operation, further than is necessarily implied by the foregoing discussion.

The records of the divorce proceedings should have been excluded by the Court; for errors in admitting them the judgment must be reversed, and the cause remanded.

We may deplore the effect of these conclusions in this particular case. But the consideration of hardship to these defendants therefrom must not be permitted to influence our judgment upon the questions presented. In

the language of Mr. Justice Elbert in Clayton vs. Clayton, *supra:* "It cannot avail against the greater hardship of concluding parties by adjudications of their most sacred rights in proceedings of which they have no notice, and to which they have never appeared."

Reversed and remanded.

STATE OF COLORADO, } ss.
Supreme Court. }

I, James A. Miller, clerk of the Supreme Court of the State of Colorado, do hereby certify the foregoing to be a true and complete transcript of the opinion filed in my office by the said Supreme Court in the case of which it is entitled, on the fourth day of December, A. D. 1883, and now remaining of record in my office.

Witness my hand and the seal of said Supreme Court hereto affixed, at Denver, this 2d day of January, A. D. 1883.

[SEAL] JAMES A. MILLER,
Clerk Supreme Court of Colorado.